

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 Department 19 Hon. Warren L. Ettinger, Judge
4

5 BETTY BULLOCK,)
6)
7 Plaintiff,)
8)
9 vs.) NO. BC249171
10)
11 PHILIP MORRIS, INCORPORATED, a)
12 corporation; et al.,)
13 Defendants.)
14)
15)

16
17
18 REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS
19 Los Angeles, California
20 August 28, 2002
21

22 APPEARANCES:

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35 Volume ____ of ____ Ruanne McArthur CRR, RPR, CM, CSR#2699
36 Page 1917 through 2097 Official Reporter
37 INDEX FOR AUGUST 28, 2002

38 M A S T E R I N D E X
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41 CHRONOLOGICAL INDEX OF WITNESSES
42

Plaintiff's					VOIR
WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS	DIRE
Rodas,	1919	1947	1961		
Sergio U., M.D.					
Wulff,	1968	1984			
Phillip S., Sr.					
Merryman,	2004				
Walker (Testimony read)					
Vandermolen,	2027	2065	2092	2095	
Louis, M.D.					

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44 EXHIBITS
45

46 WITHDRAWN

	EXHIBIT NO.	FOR IDENTIFICATION	IN EVIDENCE	OR REJECTED
19	8271	1965		
20	8358		2044	
21	8359		2046	
22	8360		2049	
23	8452		2057	
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1 M A S T E R I N D E X
2 EXHIBITS
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	EXHIBIT NO.	FOR IDENTIFICATION	IN EVIDENCE	WITHDRAWN OR REJECTED
5	12287	2081	22082	
6	12288	2079	2080	
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11	12295		1960	

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1 Los Angeles, California August 28, 2002
2 Case Number: BC249171
3 Case Name: Bullock vs. Philip Morris
4 Department 19 Hon. Warren L. Ettinger, Judge
5 Reporter: Ruanne McArthur, CSR #2699
6 Time: 9:00 a.m. Session
7 Appearances: (As heretofore noted.)
8 -oOo-
9 (The following proceedings were held
10 in open court within the presence of
11 the jury:)
12
13 THE COURT: The record will reflect that the
14 jury is present in the box, all counsel are present.
15 Mr. Piuze, you may call your next witness.
16 MR. PIUZE: Your Honor, I would, but he just ran
17 up the hall and I don't want to yell up there. He
18 should be back instantaneous.
19 THE COURT: Okay.
20 (A pause in the proceedings.)
21 THE COURT: Here is the first live witness,

22 Dr. Sergio Rodas.
23 Dr. Rodas, will you be kind enough to come
24 over and stand at this point; and when you get there,
25 just stop, face me, and raise your right hand.
26 Do you solemnly state the testimony you
27 may give in the cause now pending will be the truth, the
28 whole truth, and nothing but the truth so help you God?

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1 THE WITNESS: I do.
2 THE COURT: Would you be seated, sir, and we are
3 going to put that microphone on you in just a moment,
4 and you've got some water there.
5 Doctor, just a couple of rules. It is
6 important -- I don't know quite how they build these
7 courtrooms, but they build them so the sound system is
8 really terrible. So if you don't speak in a loud voice,
9 microphone notwithstanding, nobody is going to hear you,
10 most of all the jurors.
11 And they promised me after the last
12 witness that they are not going to be kind and gentle.
13 If they don't hear you, they are going to yell at you.
14 So be prepared.
15 (Laughter.)
16 THE COURT: Listen carefully to the question
17 that the lawyer who is questioning you asks. It is very
18 important that you only answer what he asks. If it
19 takes a yes or no answer, just give him a yes or no
20 answer. The lawyers here are more than capable of
21 following up and going down the path that they want.
22 Secondly, when the lawyer is talking, make
23 sure you are not talking, because the court reporter can
24 only take down one voice at a time.
25 And finally, when a lawyer on the other
26 side says "objection," stop, and then let me do whatever
27 I have to do, and then go on. Okay?
28 THE WITNESS: I understand.

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1 THE COURT: Go ahead, Counsel.
2 MR. PIUZE: Thank you.
3
4 * DIRECT EXAMINATION
5
6 BY MR. PIUZE:
7 Q. Good morning.
8 A. Good morning.
9 Q. Tell us your occupation, please.
10 A. I am a family physician.
11 Q. Where?
12 A. In San Juan Capistrano, California.
13 Q. Tell the jury your educational background
14 that led you to be a doctor, please.
15 A. I took an undergraduate degree in English
16 at Occidental College in Los Angeles. I attended
17 medical school at UC Irvine in Orange County, and I
18 completed a residency at family practice at the
19 San Bernardino County Medical Center.
20 Q. How long have you been practicing medicine
21 now, please?
22 A. Let's see. Since 1980 -- as a boarded
23 physician since 1987; and I received my M.D. degree in
24 1984, but I worked as a resident physician from '84 to
25 '87.
26 Q. Where?

27 A. Initially, my residency, three years at
28 San Bernardino County Medical Center. I then moved to

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1 Ventura County where I worked from 1987 through 1997. I
2 relocated to San Juan Capistrano in 1997 and have been
3 there ever since.

4 Q. Thank you.
5 You said boarded?

6 A. Yes.

7 Q. And I know what you mean and some of us
8 know what you mean, but tell us all what you mean,
9 please.

10 A. What it means is physicians practice in a
11 variety of specialties. My particular specialty happens
12 to be family practice.

13 In order to be boarded, one must pass,
14 upon completion of their residency, a certification
15 examination in family practice; and one must retake it
16 every seven years so that you are considered to hold
17 board certification by the American Board of Family
18 Practice.

19 Q. Thank you.
20 So that's you?

21 A. That is me.

22 Q. You are boarded in family practice?

23 A. I am.

24 Q. What's family practice, please?

25 A. Family practice is what used to be known
26 as general practice, where you take care of primary care
27 problems. It is said that as a family physician, if
28 your training is appropriate, you should be able to take

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1 care of roughly 90 percent of what comes to your office
2 and refer the rest. As such, I treat patients from
3 infancy to nursing home, all ages in between.

4 Q. Thanks.
5 This is a geography question. San Juan
6 Capistrano is in what county?

7 A. Orange County.

8 Q. And where is it in Orange County?

9 A. It is in southern Orange County, at the
10 very southern tip. I believe we are maybe 10 or 15, I
11 can't say for sure, miles from the San Diego County
12 border.

13 Q. Thank you. When you became a doctor down
14 in San Juan Capistrano, did you join a group of some
15 sort down there?

16 A. I work for the Camino Health Center, and
17 that is a community clinic that is owned and operated by
18 the Sisters of St. Joseph of Orange; and we take care of
19 individuals who are uninsured or underinsured;
20 essentially, a lower socioeconomic status population.

21 Q. Does that all translate into a lot of the
22 people you take care of are poor?

23 A. All of the people I take care of are poor.

24 Q. When did you first ever see Betty Bullock,
25 please?

26 A. I believe it was in early 1998, possibly
27 late 1997.

28 Q. Do you remember Betty Bullock?

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1 A. Very well.

2 Q. Do you have a chart for Betty Bullock?

3 A. We have one in the office.
4 Q. Do you have a chart with you here today?
5 A. I do not have her chart.
6 Q. Prior to your coming in before the jury,
7 did I let you look at my copy of Ms. Bullock's chart?
8 A. Yes, I did.
9 Q. As I ask you questions, would you like to
10 have my copy of Ms. Bullock's chart?
11 A. It would be helpful.
12 Q. Okay. You see that there is different
13 colored paper clips on the chart?
14 A. Yes.
15 Q. Have I explained to you that that was to
16 enable me to get around the chart?
17 A. Correct.
18 Q. Do you have a pretty fair understanding of
19 this chart with or without colored paper clips?
20 A. Yes. I probably would understand it
21 better without the paper clips.
22 Q. Please don't take them off or I'll be
23 lost.
24 Here you go.
25 THE COURT: Do you have a copy of this?
26 MR. LEITER: I have a copy of the chart, yes,
27 your Honor.
28 BY MR. PIUZE:

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1 Q. Are you the only doctor in the clinic?
2 A. No, I'm not.
3 Q. Roughly how many other doctors are in the
4 clinic?
5 A. There are three -- pardon me -- two
6 full-time physicians and one part-time physician in the
7 practice.
8 Q. Are you the only physician at the clinic
9 that saw Ms. Bullock?
10 A. I am not.
11 Q. Who else saw her?
12 A. Besides myself, Dr. Samuel Poniachik and
13 Dr. Edmond Wong, and a gentleman who was there before I
14 was, and I believe he only saw her once and I don't even
15 remember him, but his name was Dr. Smith.
16 She was also seen on one occasion by
17 Dr. Jong Lee, who is a general surgeon who saw her
18 once.
19 Q. Roughly when is the last time that you
20 saw Ms. Bullock?
21 A. May I look at the chart?
22 Q. Sure. Please.
23 (A pause in the proceedings.)
24 A. I said I was familiar with it.
25 Unfortunately, it is not in chronological order.
26 (A pause in the proceedings.)
27 A. 12-29-2000.
28 Q. Over the course of time from either late

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1 1997 or early '98 when you first saw her and 12-29-2000
2 when you last saw her, what were the kinds of things
3 that you were seeing Mrs. Bullock for?
4 A. Mrs. Bullock was seen for routine
5 health-care maintenance: Pap smears, mammograms,
6 recurrent urinary tract infections, recurrent episodes
7 of bronchitis, smoking cessation, and high cholesterol.

8 Q. We are interested here, obviously, in
9 smoking, bronchitis, and smoking cessation.

10 Do you have recollections, independent of
11 the chart, of dealing with Ms. Bullock on the issues of
12 smoking, bronchitis, and smoking cessation?

13 A. Yes, I do.

14 Q. Could you take a look, please, at the
15 notation for December 1997. I believe you will find a
16 notation there for December '97.

17 A. (Witness complied.) December 19, 1997.

18 Q. Did you see her personally, or was it
19 another doctor associated with your group that saw her
20 that day?

21 A. I saw her that day.

22 Q. On that day, can you tell the jury,
23 please, what her complaints to you were.

24 A. The note of September -- December 19, 1997
25 was not completed on the date of the visit. The chart
26 left my desk, my control, for a refill, what be it, and
27 I did not get it back until three days later.

28 What I have written in the medical record

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1 is that the patient was seen due to upper respiratory
2 infection/exacerbation of COPD. She also required lab
3 tests prior to employment.

4 The physical exam was remarkable for
5 rhonchus breath sounds bilaterally. My assessment was
6 COPD, in addition to elevated cholesterol, health-care
7 maintenance; and I treated her with some antibiotics.

8 Q. What is COPD?

9 A. It's an abbreviation for chronic
10 obstructive pulmonary disease.

11 Q. What is chronic obstructive pulmonary
12 disease?

13 A. It is a disease characterized by the
14 long-term degeneration of the lungs capacity to carry
15 out basic ventilation leading to progressive shortness
16 of breath, lowered oxygen in the bloodstream, and the
17 attendant complications therefrom.

18 Q. When you told us the things that you
19 treated Ms. Bullock for, I heard you say bronchitis, but
20 I didn't hear you say COPD.

21 Is there a connection between bronchitis
22 and COPD?

23 A. Our assessment was that she had underlying
24 COPD and that it had been exacerbated or made worse by
25 bronchitis.

26 Q. Okay. What's the difference between COPD
27 and bronchitis?

28 A. Well, I treated the bronchitis as a

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1 bacterial exacerbation of an underlying illness. COPD
2 can also be thought of as a chronic bronchitis; but when
3 I say bronchitis in here is when I am actually treating
4 her for an infection, worsening an underlying illness.

5 Q. Okay. When you say COPD can be thought of
6 as a chronic bronchitis, why do you say that?

7 A. Well, because bronchitis by definition is
8 an irritation of the bronchial passages; and that can be
9 caused by a virus, by a bacteria, by mold spores, or by
10 the respiration of some toxic substance; and cigarette
11 smoke is a chronic irritant to an individual's bronchial
12 track. It's inflamed chronically, bronchitis.

13 Q. Okay. Now, on that first day, you've told
14 us what you wrote down three days later, what treatment,
15 if any, did you suggest, please?
16 A. I treated her with oral erythromycin, 250
17 milligrams four times a day.
18 Q. Do you say anything to her about quitting
19 smoking?
20 A. No, I did not, not on that date.
21 Q. I have, according to my notes here, a
22 visit that you had with Ms. Bullock, or at least two
23 visits or maybe more, in March of 1998.
24 Could you take a look at that part of your
25 chart, please.
26 A. I have it in front of me.
27 Q. Can you tell the jury how many times,
28 according to that chart, you saw Ms. Bullock around

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1 March of 1998?
2 A. I saw Ms. Bullock on March 9, 1998 and
3 March 27, 1998.
4 Q. For what complaints, please?
5 A. On March 9, she presented with complaints
6 of increased urinary frequency and dysuria, pain with
7 urination. She also gave a history of continuing to
8 cough up, at that time without sputum production; and
9 she also expressed at that time a wish to try the
10 prescription medication Zyban to quit smoking.
11 Q. What did you think about her desire of
12 wanting to quit smoking?
13 MR. LEITER: Objection. Vague.
14 THE COURT: Sustained.
15 BY MR. PIUZE:
16 Q. When she told you that she wanted to quit
17 smoking, did you give her reinforcement that that might
18 be a good thing?
19 A. Yes, I did.
20 Q. Why?
21 MR. LEITER: Objection. I'm sorry. What was
22 the question?
23 BY MR. PIUZE:
24 Q. Why?
25 A. Because it's incumbent upon me, as a
26 doctor, to strongly encourage my patients who smoke to
27 quit smoking.
28 Q. Whether it's Betty Bullock, Sally Smith,

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1 Jimmy Jones, or anyone else, is it part of your training
2 that when people come in and get anyplace near the
3 subject of smoking, you tell them it's not a good thing?
4 A. Yes.
5 Q. And had that been your method of practice
6 long before you moved down to San Juan Capistrano?
7 A. Yes, long before.
8 Q. When she told you that she wanted to quit
9 smoking and that she wanted you to give her a
10 prescription of some sort, did you?
11 A. Yes, I did.
12 Q. For Zyban?
13 A. Yes.
14 Q. Okay. And the next time you saw her,
15 please tell us the date.
16 A. March 27, 1998.
17 Q. The complaints she gave to you, please.

18 A. Continues to have persistent cough and
19 sputum. Still has superpubic or abdominal discomfort
20 and pain and continues to cite painful urination.
21 Q. Was there any further medication given to
22 her for anything?
23 A. Yes, there was.
24 Q. For what?
25 A. I changed -- I treated her with another
26 course of antibiotics; originally treated with
27 erythromycin, and on this date I changed and treated her
28 with the antibiotic Floxin for ten days.

1929

1 Q. All of the medicines you just mentioned,
2 were those for urinary-type problems?
3 A. Yes.
4 Q. Not for smoking cessation?
5 A. Not -- well, not for smoking cessation.
6 Floxin is not used for that.
7 Q. Right. So on the second visit, is there
8 any mention there of any medication as far as smoking
9 cessation is concerned?
10 A. She volunteered that she was currently
11 using a nicotine patch.
12 Q. Now, was a nicotine patch something that
13 you had prescribed her previously?
14 A. I had recommended it to her.
15 Q. Okay. Was that in addition to Zyban?
16 A. Yes.
17 Q. One of the things that you said before I
18 gave you the chart was that you have independent
19 recollections of Ms. Bullock without the chart.
20 A. Yes, I do.
21 Q. Do you recall that?
22 On these occasions in March of 1998, did
23 you have discussions with Ms. Bullock about stopping
24 smoking?
25 A. Yes, I did.
26 Q. In March of 1998, did Ms. Bullock confide
27 in you her feelings, thoughts, state of mind about
28 stopping smoking?

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1 A. Yes, she did.
2 Q. Do you have a pretty distinct recollection
3 of that?
4 A. A very distinct recollection of that.
5 Q. Why is it now in 2002, I think we are like
6 four and a half years later, that you have a very
7 distinct recollection of that?
8 MR. LEITER: Objection. I think we are heading
9 for some hearsay, and I want to make sure the answer
10 isn't going to contain hearsay.
11 THE COURT: I am somewhat at a loss as to -- are
12 you objecting to the particular question?
13 MR. LEITER: I am objecting to the particular
14 question to the extent that it calls for hearsay.
15 THE COURT: I don't want to give the doctor a
16 legal course in hearsay, so let's see if you can try a
17 different question and maybe we will work it that way;
18 because the real relevance is not why he remembers.
19 MR. PIUZE: Sure, of course.
20 THE COURT: So let's move on to something else.
21 MR. PIUZE: Well, I want to know what she said;
22 and the reason I want to know what she said is I want to

23 know what her then existing state of mind was.
24 THE COURT: Then we are in hearsay.
25 MR. PIUZE: Absolutely. Sure.
26 THE COURT: And I will sustain the objection.
27 MR. PIUZE: Evidence Code 1250, your Honor.
28 THE COURT: Objection sustained.

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1 MR. PIUZE: May we approach on that?
2 THE COURT: You may.
3
4 (The following proceedings were held
5 at sidebar:)
6
7 MR. PIUZE: EC 1250 is directly on point, and I
8 asked the court to take a look at it. I know you are
9 familiar with the Evidence Code, but there is a hearsay
10 exception if a declarant states his or her then existing
11 state of mind, feelings, physical sensations,
12 psychological, anything, as long as it's then existing;
13 and this is right smack on the -- right on the head,
14 right on the nail.
15 MR. LEITER: Well, my understanding of what the
16 answer of the question is going to be is it is not state
17 of mind. State of mind does not obviate the matter as a
18 rule.
19 He is going to testify about what she said
20 for the truth of the matter asserted what, she believed
21 about health risks, what she believed about her ability
22 to quit smoking. This is not state of mind. It's just
23 straight hearsay for the truth of the matter asserted.
24 Mrs. Bullock is testifying in this case.
25 She is fully capable of testifying as to what she said,
26 thought, believed in 1998. We don't need a hearsay
27 witness to tell the jury what she said about that time.
28 MR. PIUZE: May I grab my Evidence Code? I've

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1 got it right under the bench.
2 THE COURT: Yes, you may.
3 (A pause in the proceedings.)
4 THE COURT: What section do you want me to
5 read?
6 MR. PIUZE: 1250.
7 THE COURT: Okay.
8 (A pause in the proceedings.)
9 THE COURT: Objection sustained.
10 MR. PIUZE: Your Honor, before I leave here,
11 because this is the reason I called him, if the court
12 could share if it's reasonable of me, maybe I could say
13 something further because -- I mean, this is the first
14 time I have ever asked to approach the bench for an
15 evidentiary reason because I don't understand why this
16 doesn't fit exactly hand and glove.
17 I've got Jefferson here, and I know he's
18 not the absolute king of the world, he's not Witkin, but
19 her then existing state of mind, emotion --
20 THE COURT: Is relevant because?
21 MR. PIUZE: It's relevant because they say she
22 did not try to quit hard enough. She could have quit,
23 she should have quit, and this entire line of
24 questioning is about how hard she tried, how guilt
25 ridden she was because she couldn't, how she literally
26 tore her heart out to try to stop smoking.
27 THE COURT: Is she not going to testify to

28 that?

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1 MR. PIUZE: Whether she can, whether she does or
2 doesn't, your Honor -- and what -- she can't testify to
3 it as well as this man can. She had severe cognitive
4 problems, as this afternoon's witness will tell you.
5 Her memory is shot and she is not as reliable a witness
6 as this one is who knows this stuff well.

7 Even if she could, here is an independent
8 witness who can verify this stuff.

9 MR. PIUZE: You are offering evidence now that
10 is at best rebuttal evidence to evidence that has not
11 been proffered. The objection is sustained. There is
12 no question this witness, who is an elegant witness and
13 maybe as good as I have ever heard, may very well -- may
14 very well be able to testify in rebuttal to something
15 once it has been raised, but it has not been raised yet
16 in this court; and, therefore, the objection, as it has
17 been phrased by counsel, is sustained.

18 MR. PIUZE: On straight hearsay because as we
19 have been discussing, as your Honor went from hearsay to
20 relevance --

21 THE COURT: That's true, I did; but the
22 objection is on hearsay. The state of where we are
23 is -- and based on your proffer -- is at best rebuttal
24 evidence to refute a theory that you are articulating
25 that they are going to offer, which they haven't yet;
26 and so as of this moment and as of this question, the
27 objection on hearsay is sustained.

28 Now, if they come up with the theory that

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1 you have mentioned and you want to bolster testimony as
2 to how she tried, that's well and good, but we are not
3 there yet. The objection is sustained.

4 MR. PIUZE: Okay.

5
6 (The following proceedings were held
7 in open court within the presence of
8 the jury:)
9

10 BY MR. PIUZE:

11 Q. Dr. Rodas, as I ask more questions, I'd
12 like you not to quote Ms. Bullock. Okay?

13 And further, it isn't just quotes. I
14 don't want you to give the content of what she said to
15 you on the issue we are going to discuss. All right?

16 A. (Nods head affirmatively.)

17 Q. Confirm, please, that you had more than
18 one lengthy two-way conversation with Ms. Bullock about
19 quitting smoking?

20 A. Yes.

21 Q. Over the course of time -- this is no
22 longer a Ms. Bullock question, your Honor; this is a
23 general question -- over the course of time, do you
24 treat people who smoke and have symptoms that you
25 believe are a result of smoking?

26 A. Yes.

27 Q. Over the course of time, do you
28 100 percent of the time, tell these people "stop"?

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1 A. No.

2 Q. Why not?

3 A. If they've got terminal lung cancer, in my

4 opinion, they are going to die anyway. There's no point
5 in telling them not to smoke then.

6 Q. Good enough. Let's leave these people
7 aside; and now we have people who don't have terminal
8 lung cancer who come to you, and they've got symptoms
9 that you think are as a result of smoking and they are
10 smoking cigarettes, do you always tell them, "Hey, you
11 should stop"?

12 A. I do.

13 Q. Do they?

14 A. No.

15 Q. Do some?

16 A. Some, yes.

17 Q. Some do, most don't?

18 A. That's correct.

19 Q. Do patients who come to you -- again, this
20 is not Ms. Bullock, now, it is just generally. I will
21 be coming back to Ms. Bullock.

22 Do patients who come to you with symptoms
23 that you believe are related to smoking and who are
24 smokers who you have told to stop, in your own view
25 based on your experience in checking them out, do you
26 believe they all try, really try to stop?

27 A. No.

28 Q. Are there occasions when smokers who come

1936

1 to you with symptoms you think are related to smoking
2 and you have heard from them "I'm trying to stop,
3 Doctor. I heard what you said. I'm trying to stop,"
4 are there times where you think, "Well, probably not
5 really trying that hard"?

6 A. Yes.

7 Q. Back to Ms. Bullock.

8 In your opinion, was Ms. Bullock trying
9 real hard to stop smoking?

10 A. Yes.

11 Q. In your opinion, did she give it at least
12 the old college try?

13 A. She gave more than that.

14 Q. Based on the things she told you -- I
15 don't want you quoting things yet or at all. I don't
16 want you quoting things, but based upon the things that
17 she told you, did you believe that she was
18 well-motivated to quit smoking?

19 A. Yes, I did.

20 Q. Was she somewhat successful over a period
21 of time?

22 A. Yes.

23 Q. As we go through some of these chart
24 entries here, will there be entries that say on several
25 occasions she has either stopped for short periods of
26 time or that she had cut back drastically for short
27 periods?

28 A. Yes.

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1 Q. As a -- did you ever meet her daughter?

2 A. No.

3 Q. Did you have information that her daughter
4 was involved in the stop-smoking process?

5 MR. LEITER: Objection. Calls for hearsay.

6 THE COURT: Sustained.

7 MR. PIUZE: I will withdraw it. I will withdraw
8 it, your Honor.

9 Q. Were there -- were there issues aside from
10 straight health issues that were involved in the
11 stop-smoking process?
12 A. Yes.
13 Q. When you counsel people -- again, this is
14 general now -- when you counsel people to stop smoking,
15 they come in with a cough, bronchitis, whatever, and you
16 tell them "This isn't good for you, you better stop" --
17 A. Yes, I do.
18 Q. -- what, if you can -- can you give us a
19 percentage of people that you've seen who have
20 successfully been able to stop?
21 A. Five percent.
22 Q. Do you offer words of encouragement or
23 insight to smokers trying to stop?
24 A. Yes, I do.
25 Q. Again, this is not a Mrs. Bullock specific
26 question; but generally, what kind of encouragement do
27 you offer them, please?
28 A. Positive.

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1 Q. Okay.
2 A. Non-judgmental.
3 Q. All right.
4 A. Non-intimidating.
5 Q. Okay. So I guess I should know what that
6 means; positive and non-judgmental and non-intimidating?
7 A. Yes. Would you like me to tell you what
8 it is?
9 Q. Yeah.
10 A. I don't berate patients. I don't talk
11 down to them. I don't take cigarettes out of their
12 pockets and put them in the trash. I don't call them
13 stupid. I don't do anything in that manner, because to
14 me, that has no place in treating a patient.
15 The fact that they have even had the nerve
16 to bring it up, in my opinion, calls upon me to be
17 resourceful insofar as structuring an approach for that
18 patient to try to get them to quit smoking.
19 Q. In regard to Ms. Bullock's smoking-related
20 symptoms, did you structure an approach to her to try to
21 get her to stop smoking?
22 A. Yes, I did.
23 Q. What?
24 A. Pharmacological approach?
25 Q. I'd like the whole approach, but let's
26 start with pharmacological.
27 A. She first came to me about going on Zyban,
28 and that her -- I believe her daughter was willing to

1939

1 pay for it if I prescribed it, because she really wanted
2 to quit smoking and she was familiar with the product.
3 I told her that the way that it was
4 prescribed and to be used was likely to be unsuccessful
5 in her case unless she also used simultaneous patch
6 nicotine replacement; and I structured it for her as to
7 what dosage to take, on a certain day stop smoking, put
8 on the patch, avoid contact with smokers, do not allow
9 anybody to smoke around you, avoid the activities that
10 made you smoke; but most importantly, quit kicking
11 yourself because you do smoke.
12 Q. Why did you say, at the beginning of that
13 answer, that because of something you thought Zyban

14 alone would be unlikely to work successfully?
15 A. I felt Mrs. Bullock was very dependent on
16 cigarettes and had done so for a long time; and that if
17 nothing else, the absence of nicotine, the nicotine
18 withdrawal, would favor her failing to quit; and I felt
19 that we had more of a chance if simultaneous with the
20 oral Zyban, we were also doing nicotine replacement. I
21 didn't think it would work only with the Zyban.
22 Q. Okay. As part of your discussions with
23 Ms. Bullock, did you get a history from her of how much
24 she was smoking?
25 A. Yes.
26 Q. Did you get a history from her of when she
27 started to smoke?
28 A. Yes.

1940

1 Q. What was that?
2 A. As a teenager.
3 Q. When you first saw her, was she someplace
4 in the vicinity about 60 years old, round numbers?
5 A. Yes.
6 Q. After March, when is the next time that
7 you saw Ms. Bullock?
8 A. May I refer to the record?
9 Q. Sure. And I will give you a hint. I have
10 a feeling it was in April, but I could be wrong.
11 A. April 20 of 1998.
12 Q. So reasons, please, the reasons she was in?
13 A. She came in for symptoms of urinary tract
14 infection, complained of a sore throat, persistent
15 coughing.
16 Q. What did you do for her, please?
17 A. I added a urinary antibiotic -- excuse
18 me. April 20. There's a visit also April 6. I have an
19 April 6 and an April 20.
20 Q. Why don't we take a running start, then.
21 Let's go back to the 6th, which I don't believe they
22 have heard.
23 A. Okay.
24 Q. Tell the jury why she was in on the 6th,
25 please.
26 A. On the 6th of April, she came in because
27 she was having to get up to urinate at night. She
28 reported an improved cough on that date, told me that

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1 she had actually quit smoking, and that she had found
2 Zyban had made a difference. She also complained of
3 pain in her left elbow.
4 Q. Thank you. Next day, which I believe you
5 said was the 20th --
6 A. The 20th was the next time I saw her.
7 Q. -- what did you prescribe for her, if
8 anything, that day?
9 A. I restarted the antibiotic Floxin for the
10 urinary tract infection and also prescribed a
11 suppressive antibiotic for urinary tract infections,
12 which is Macrodantin. I also drew some blood work on
13 her that day.
14 Q. When is the next time that you saw her,
15 please?
16 (A pause in the proceedings.)
17 A. I apologize. If the chart was in
18 chronological order, I could go right to it. Inasmuch

19 as it is not, I have to go through it page by page.
20 (A pause in the proceedings.)
21 A. The next visit I find I saw her on was
22 November 10 of 1998.
23 Q. The reason, please?
24 A. She came in for her annual breast exam,
25 Pap smear, but also once again had begun to complain of
26 coughing up green-tinged sputum, and she volunteered
27 that she had restarted smoking in August of 1998.
28 Q. Did you prescribe any further anti-smoking

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1 aids to her at that time?
2 A. According to my note, I did not.
3 Q. During this time, sometimes would she be
4 seen by one of your associate doctors?
5 A. Yes.
6 Q. Especially, I'm going to mangle this name
7 again now, Dr. Poniachik?
8 A. Yes.
9 Q. Are his notes also in there as part of
10 your office's charts?
11 A. Yes, they are.
12 Q. When you treated Ms. Bullock and she had
13 seen your associate in between, did you rely upon his
14 chart notes to help you treat her?
15 A. Yes.
16 Q. Did his chart notes also contain mentions
17 of stop-smoking issues, please?
18 (A pause in the proceedings.)
19 Q. If I could give you a cue, I would be
20 thinking maybe around December '98, May, '99, September
21 '99 would be the kind of the dates.
22 A. Okay.
23 (A pause in the proceedings.)
24 A. I have notes from Dr. Poniachik in May
25 '99, September '99, October '99.
26 Q. What were the reasons -- let's take them
27 chronologically. Okay? -- the reasons Ms. Bullock was
28 in on the first occasion, please?

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1 A. Okay. And I misspoke. There was also one
2 on 12 of '98, so that will be the first one.
3 Q. Okay.
4 A. 12 of '98 from the chart notes that
5 Dr. Poniachik produced that day, his assessment included
6 bronchitis, abdominal pain, and rectal discharge.
7 Q. Okay. And because of our issues here
8 being smoking and smoking cessation and bronchitis,
9 those kinds of issues, what did Dr. Poniachik prescribe
10 or say on the chart she should do on those issues?
11 A. He is -- the subjective part of his note
12 has "positive tobacco" written on it. Under his plan
13 where he has bronchitis, number one says, "The
14 antibiotic Bactrim DS," twice daily, and his sub plan
15 number two, it says "discontinue tobacco."
16 Q. Okay. The next time, please -- remind us
17 of the date.
18 A. May 20, 1999.
19 Q. Can you tell us the reasons for which
20 Dr. Poniachik saw Ms. Bullock that day?
21 A. Complaint of painful urination, cough,
22 wheezing.
23 Q. And the plan, as far as the cough/wheezing

24 issues are concerned?
25 A. Antibiotic Bactrim DS, twice daily, and
26 discontinue tobacco, and a prescription for Zyban 150
27 milligrams twice daily.
28 Q. The next date, if you could remind us of
1944
1 it, please?
2 A. September 10 of 1999.
3 Q. The complaints for which Dr. Poniachik saw
4 Ms. Bullock on that date, please?
5 A. Production of yellow mucous and chest pain.
6 Q. The prescriptions, if any, in regard to
7 those symptoms?
8 A. Amoxicillin 500 milligrams three times
9 daily for a week, rest, fluids, the cough medicine
10 Finergin with codeine. I believe he has Tylenol. He
11 checked some blood work, and he has indicated on his
12 progress notes "smoking cessation."
13 Q. Thank you. Now, you told us earlier the
14 last date that you saw Ms. Bullock, and I believe it was
15 a date in 2000.
16 Do you recall that?
17 A. Yes.
18 Q. Do you have that note?
19 A. I can find it. 12-29-2000.
20 Q. The reason, please?
21 A. She came in that day to follow up on
22 elevated cholesterol, two- to three-week history of
23 cough, right earache, and once again said wishes to try
24 Zyban to quit smoking.
25 Q. What did you do in response to that?
26 A. I treated her with the antibiotic
27 amoxicillin and with the bronchial dilator Volmax
28 because I appreciated wheezing in her chest, refilled
1945
1 her cholesterol medication, and by this time she could
2 not get the Zyban anymore.
3 So I dispensed to her what I did have,
4 which was a sample of Wellbutrin, which is the same
5 medicine under a different brand name.
6 Q. Why could she not get the Zyban?
7 A. I think her daughter wouldn't pay for it
8 anymore.
9 Q. Is Wellbutrin an antidepressant?
10 A. It is.
11 Q. Does Zyban -- is Zyban exactly the same as
12 Wellbutrin?
13 A. They are alike in everything but brand
14 name.
15 Q. You gave her a freebie sample out of your
16 office in order to help her try to stop smoking?
17 A. Yes, I did.
18 Q. The last time you ever saw Ms. Bullock --
19 and by the way, is that the last time you ever saw
20 Ms. Bullock?
21 A. Let me double-check.
22 (A pause in the proceedings.)
23 A. From what I have in the chart here, yes,
24 that was the last time I saw Ms. Bullock.
25 Q. Okay. So between late '97 and late 2000,
26 during those four years that you saw Ms. Bullock, was a
27 recurring theme her desire to stop smoking?
28 A. Yes.

1 Q. Is it your statement to the jury that you
2 believe she really tried to stop smoking during that
3 period?

4 A. Yes.

5 Q. I don't want any quotes now or any content
6 of conversations. I will caution you in advance.

7 Earlier in my questioning of you, you said
8 that you had a clear recollection independent of your
9 records of these things. Is it possible for you to tell
10 us why you have a clear recollection of these things
11 without going into the content of the discussions,
12 please?

13 A. She was very vocal about it. She brought
14 it up every visit. She was very distressed over her
15 inability to quit smoking.

16 Q. At any point during the four years that
17 you treated her, did you ever, in your view, look at her
18 and say, "Here's some woman who won't follow my advice"?

19 A. No.

20 Q. Once even did you think that?

21 A. She tried to follow my advice. She didn't
22 follow it.

23 MR. PIUZE: No further questions.

24 THE COURT: Cross-examination.

25 MR. LEITER: Thank you, your Honor.

26 Good morning.

27 (All respond.)
28

1 * CROSS-EXAMINATION

2
3 BY MR. LEITER:

4 Q. Good morning, Dr. Rodas.

5 A. Good morning, sir.

6 Q. We met some time ago at your deposition in
7 this case?

8 A. Yes, we did.

9 Q. I want to follow up on some of the
10 questions that Mr. Piuze asked you this morning. You
11 first treated Mrs. Bullock in, I believe, December of
12 1997; is that right?

13 A. That's correct.

14 Q. Okay. And at that time, one of your
15 diagnoses of her was that she had COPD?

16 A. Yes.

17 Q. And that's chronic obstructive pulmonary
18 disease?

19 A. Yes.

20 Q. Potentially fatal disease?

21 A. Eventually, yes.

22 Q. Very, very serious disease?

23 A. Yes.

24 Q. Caused by smoking?

25 A. In my opinion, yes.

26 Q. Okay. And you discussed that diagnosis
27 with Mrs. Bullock on that day; isn't that right?

28 A. Yes, I did.

1 Q. You told her that she had COPD?

2 A. What I would have used with her is the
3 term "bronchitis."

4 Q. Okay. You told her that it was a serious

5 problem?
6 A. Yes.
7 Q. And you told her that it was caused by
8 smoking?
9 A. Yes, I did.
10 Q. And you told her that she needed to quit
11 smoking?
12 A. Yes, I did.
13 Q. You next saw Mrs. Bullock on March 9, I
14 think you mentioned earlier; and if you want to take a
15 minute and find the chart, that would be great.
16 (A pause in the proceedings.)
17 A. March 9, 1998.
18 Q. Okay. And I think you mentioned in the
19 questioning earlier this morning that on that date, you
20 diagnosed her as having bronchitis?
21 A. Yes, I did.
22 Q. And the bronchitis represented a worsening
23 of the COPD, right?
24 A. Yes.
25 Q. And you told Mrs. Bullock that?
26 A. I would have used the word "bronchitis" or
27 "chronic bronchitis."
28 Q. But you told her the situation was getting
1949
1 worse?
2 A. I don't recall specifically using that
3 phrase with her.
4 Q. Okay. But you told her that she had a
5 serious bronchial problem?
6 A. Yes, I did.
7 Q. Okay. And that, I believe, is when you
8 first diagnosed -- excuse me -- first prescribed Zyban
9 for her?
10 A. At her request.
11 Q. At her request.
12 Now, let's talk for a minute about Zyban.
13 Zyban is a prescription drug, right?
14 A. Yes, it is.
15 Q. And it's designed to help reduce the
16 cravings for nicotine?
17 A. It is.
18 Q. Okay. And it's similar to a nicotine
19 patch or a nicotine gum in that they are also designed
20 to reduce the cravings for nicotine?
21 A. Through different mechanisms, but yes.
22 Q. Okay. Using a drug like Zyban, in your
23 opinion, is not in and of itself enough for somebody to
24 successfully quit smoking?
25 A. I did not feel that in this patient it was
26 enough.
27 Q. Okay. Sometimes it might be --
28 A. Yes.
1950
1 Q. -- but other times it's not?
2 A. Correct.
3 Q. Okay. I believe in your deposition we
4 talked about behavioral lifestyle changes that are
5 necessary as well, right?
6 A. We did.
7 Q. And you would agree that for anybody who
8 uses Zyban, it's important also to make changes in your
9 lifestyle?

10 A. It is true of Zyban as many other
11 medicines, correct.
12 Q. And a lot of medicines -- medicines aren't
13 wonder drugs?
14 A. No, they are not.
15 Q. Okay. A person, the smoker in this case,
16 has to help the drug work?
17 A. Actually, the drug helps the patient work.
18 Q. Okay. Fair enough.
19 And it's important for somebody using
20 Zyban to try to quit smoking to also make some lifestyle
21 changes, right?
22 A. Absolutely true.
23 Q. And you discussed some of those lifestyle
24 changes with Mrs. Bullock on that date, didn't you?
25 A. I did.
26 Q. And the lifestyle changes would include
27 figuring out what in the day triggers your desire to
28 have a cigarette, for example, some people like a

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1 cigarette after a meal, right?
2 A. Correct.
3 Q. To know that you are going to want a
4 cigarette after a meal and to deal with that in some
5 other way, right?
6 A. Correct.
7 Q. To recognize when the trigger is coming?
8 A. Correct.
9 Q. To set a quit date?
10 A. I did.
11 Q. Okay. And to reward yourself when you get
12 to your quit date, maybe throw a party?
13 A. I don't typically recommend that.
14 Q. Okay. But to set a quit date, to set a
15 goal and try to reach that goal?
16 A. Yes.
17 Q. And to take away the temptation to smoke,
18 if you can, in the meantime, right?
19 A. That's correct.
20 Q. Throw away the cigarettes?
21 A. Yes.
22 Q. Throw away the ashtrays?
23 A. Yes.
24 Q. Throw away the matches?
25 A. Yes.
26 Q. Throw away the lighters?
27 A. Whatever is associated with smoking for
28 them, pitch it.

1952

1 Q. And Zyban helps the patient quit smoking,
2 and the behavioral changes are important too, right?
3 A. That's correct.
4 Q. Okay. And you discussed that with
5 Mrs. Bullock on March 9?
6 A. Yes.
7 Q. Okay. You mentioned that you next saw her
8 on April 6; and you might want to take a minute and find
9 that, and I'd like to show this one to the jury.
10 So, your Honor, this is marked as
11 Exhibit 12291.
12 MR. PIUZE: May I inquire? Is this just one
13 page out of the records, or is that for the whole
14 record?

15 MR. LEITER: I am going to offer three or four
16 individual pages from the record.
17 THE COURT: Okay. Now, let's make sure we -- I
18 am doing the right notation. 12291 is what in its
19 entirety?
20 MR. LEITER: Is the portion of the chart --
21 Dr. Rodas's Camino Health Center chart dated April 6,
22 1998.
23 THE COURT: Okay. Hold on.
24 (A pause in the proceedings.)
25 THE COURT: And you are going to be showing him
26 some individual pages from the April 6, 1998 chart?
27 MR. LEITER: No, your Honor. The April 6, 1998
28 chart is one piece of the entire medical chart that

1953

1 Dr. Rodas has before him.
2 THE COURT: Okay.
3 MR. LEITER: So I am marking individual pages
4 that I'd like to show the jury.
5 THE COURT: So I just want to find out, Exhibit
6 12291 is an individual page?
7 MR. LEITER: Yes, your Honor.
8 THE CLERK: What is the page number, your
9 Honor?
10 THE COURT: 12291 is a page -- I am trying to
11 find this out myself -- from the April 6, 1998 chart of
12 the plaintiff.
13 MR. LEITER: Actually, it is the April 6, 1998
14 chart, but it's a portion of the complete set of medical
15 records. I'm sorry if I wasn't clear.
16 THE COURT: Okay. 12291 is the chart of the
17 plaintiff for April 6, 1998?
18 MR. LEITER: Yes.
19 THE COURT: Okay.
20 MR. LEITER: And I would like to offer it so I
21 may show it to the jury.
22 THE COURT: Is there any objection?
23 MR. PIUZE: No.
24

25 * (Marked for identification Joint
26 Exhibit number 12291, document.)
27

28 THE COURT: First time I have ever heard anybody

1954

1 say no with a question mark at the end of it.
2 MR. PIUZE: It was actually a semicolon. It was
3 no. I hate to be paranoid about spoon-feeding selective
4 little pieces, but I think at some point I will offer
5 the whole chart and then this would be duplicative; and
6 I didn't want to say that out loud, but that's what my
7 thinking is.
8 THE COURT: Well, you certainly have the right
9 to offer the whole chart, and whether it's received or
10 not, may in and of itself be duplicative; but as to
11 12291, it is offered in evidence and it is received.
12
13 * (Received in evidence Joint
14 Exhibit number 12291, document.)
15
16 THE COURT: You may show it to the jury.
17 MR. LEITER: Thank you, your Honor.
18 Q. Dr. Rodas, is this the April 6, 1998 chart
19 that you have been referring to?

20 A. Yes, it is.
21 Q. And you have been refreshing your
22 recollection in part by looking at this chart about your
23 April 6, 1998 visit with Mrs. Bullock, right?
24 A. Yes.
25 Q. Okay. And as you mentioned when Mr. Piuze
26 was questioning you, this was about three weeks after
27 you had first prescribed Zyban to Mrs. Bullock, right?
28 A. Yes.

1955

1 Q. And she reported -- my coloring skills are
2 not very good, as my kids tell me. She reported on that
3 day that she has quit smoking -- it doesn't come out --
4 "has quit smoking and finds Zyban makes a real
5 difference." Is that right?
6 A. That's correct.
7 Q. Okay. You next saw her on April 20 of
8 1998; is that right?
9 A. Yes.
10 MR. LEITER: And I'd like to offer that chart
11 as well, which is Exhibit 12292.
12 THE COURT: Any objection?
13 MR. PIUZE: No.
14 THE COURT: All right. It may be received.
15

16 * (Received in evidence Joint
17 Exhibit number 12292, document.)
18

19 MR. LEITER: I am not going to try to color
20 this time.

21 Q. Is this the chart that you have been
22 referring to?

23 A. Yes.

24 Q. Okay. And on April 20, 1998, which was a
25 couple of weeks after the visit we were talking about,
26 Mrs. Bullock reported that she was "still on Zyban" and
27 I don't know what that says, do you?

28 A. "2/D," two per day.

1956

1 Q. So she says she is taking two Zybans per
2 day and sneaks a few cigarettes, quote, here and there?

3 A. Parenthesis --

4 Q. Eight per day; is that right?

5 A. That's correct.

6 Q. So she on April 20 reported she was still
7 taking the Zyban, as you had prescribed, right?

8 A. Yes.

9 Q. And while she was smoking about eight
10 cigarettes a day, that was far, far less than she had
11 been smoking before you prescribed Zyban, right?

12 A. That's correct.

13 Q. I have three more that I would like to
14 show you. The next one is the chart that you referred
15 to earlier on November 10, 1998, which is
16 Exhibit 12293.

17
18 * (Marked for identification Joint
19 Exhibit number 12293 document.)
20

21 MR. LEITER: I am offering that, your Honor.

22 THE COURT: Any objection?

23 MR. PIUZE: No.

24 THE COURT: It may be received.

25
26 * (Received in evidence Joint
27 Exhibit number 12293, document.)
28

1957

1 BY MR. LEITER:
2 Q. Do you have that before you, Dr. Rodas,
3 from your copy?
4 A. I sure do.
5 Q. Is this the chart that you are --
6 A. Yes.
7 Q. Okay. And this reports on Mrs. Bullock's
8 visit of 11-10, November 10, 1989; is that right?
9 A. Yes.
10 Q. So it's a few months later from the last
11 one that we saw?
12 A. It is.
13 Q. Okay. And in that visit Mrs. Bullock
14 reported that she quit smoking 6-8-98; is that right?
15 A. Yes.
16 Q. So she had quit smoking for somewhere
17 around two or three months, right?
18 A. Yes.
19 Q. Okay. And then started again, right?
20 A. That's correct.
21 Q. Okay. We are going to jump ahead in time
22 a little bit to another chart that you mentioned
23 earlier, which is November 9 of 2000, which is
24 Exhibit 12294, which I am offering.
25 THE COURT: Any objection?
26 MR. PIUZE: No.
27 THE COURT: It may be received.
28

1958

1 * (Received in evidence Joint
2 Exhibit number 12294, document.)
3
4 MR. LEITER: I will wait until you are ready.
5 THE WITNESS: Actually, I would like that up
6 there.
7 MR. LEITER: Do you have it?
8 THE WITNESS: No, I don't.
9 BY MR. LEITER:
10 Q. November 9, 2000. Is this one of the ones
11 you were looking at earlier? I don't want to make you
12 twist around and look at the screen. I know it's
13 difficult from there, so if you want to take a minute
14 and find it.
15 (A pause in the proceedings.)
16 A. What date is this, 9-23?
17 Q. No. I'm sorry. It's 11-9-20.
18 A. 11-9-2000.
19 (A pause in the proceedings.)
20 A. Can I see the bottom on that?
21 Q. Actually, why don't I hand it up to you.
22 It might be easier than you twisting around and looking
23 at the screen.
24 A. That is Dr. Wong's note. I was looking
25 for one of mine.
26 Q. Okay.
27 (A pause in the proceedings.)
28 A. There it is.

1959

1 Q. Do you have it?
2 A. Sorry about the delay.
3 Q. No problem.
4 This is the chart, Exhibit 12294, from
5 November 9, 2000, right?
6 A. Correct.
7 Q. And this, I think you mentioned when
8 Mr. Piuze was questioning you, was Mrs. Bullock's visit
9 with Dr. Wong?
10 A. Correct.
11 Q. And on that date Mrs. Bullock reported,
12 "patient quit then restarted smoking three to four
13 cigarettes a day"; is that right?
14 A. That's correct.
15 Q. So she was smoking, but far, far less than
16 before you started treating her, right?
17 A. Yes.
18 Q. And the next line is "Wants to quit;
19 requesting nicotine gum and patches," right?
20 A. Correct.
21 Q. The last one that I'd like to show you is
22 the chart from December 4, 2000; and I believe this is
23 not one of yours. This is another of the doctors that
24 you mentioned earlier. It's Exhibit 12295, dated
25 December 4, 2000, which I offer.
26 THE COURT: Any objection?
27 MR. PIUZE: No.
28 THE COURT: It may be received.

1960

1
2 * (Received in evidence Joint
3 Exhibit number 12295, document.)
4
5 MR. LEITER: Maybe if I can approach, I will
6 show you which one it is.
7 (A pause in the proceedings.)
8 A. This is it.
9 Q. Okay. Thank you.
10 This is Exhibit 12295; and, Dr. Rodas,
11 this is Mrs. Bullock's chart for what appeared to be
12 December 4, 2000; is that right?
13 A. Yes.
14 Q. And on that day Mrs. Bullock reported
15 that she is on Zyban. I assume that means she is taking
16 Zyban, yes?
17 A. Yes.
18 Q. Has been able to cut down on smoking to
19 three per day; is that what that says?
20 A. Yes.
21 Q. So she is down to three cigarettes a day;
22 is that right?
23 A. Correct.
24 Q. And I am done asking you about that record.
25 Now, Dr. Rodas, Zyban helped?
26 A. Yes.
27 Q. Okay. Apparently, Mrs. Bullock did not
28 stop smoking completely and permanently while she was

1961

1 under your care, right?
2 A. That's correct.
3 Q. But she was able to dramatically cut down
4 on the amount of smoking that she did?
5 A. Yes.

6 Q. And was able to fully stop for, it appears
7 at one point, two or three months?
8 A. By her history, yes.
9 Q. Okay. Now I'd like you to assume for just
10 a moment, Dr. Rodas, that Mrs. Bullock has testified in
11 this case that she never threw out her cigarettes, never
12 threw out her ashtrays. That would be inconsistent with
13 your advice to her, wouldn't it?
14 A. Yes, it would.
15 MR. LEITER: Thank you, Dr. Rodas. No further
16 questions.
17 THE COURT: Redirect?

18
19 * REDIRECT EXAMINATION

20
21 BY MR. PIUZE:

22 Q. Have you heard anything that changes your
23 mind about the fact that she tried real, real hard to
24 quit?
25 A. No.
26 Q. Is part of being a good doctor being able
27 to eyeball someone, take a look at someone, figure out
28 who is BS-ing you and who isn't?

1962

1 A. A good doctor or a good lawyer I suppose,
2 yes.
3 Q. Did you take that into account in what you
4 were telling the jury just now?
5 A. Yes, of course.
6 MR. PIUZE: Your Honor, I don't have any further
7 questions right now. Before we let the doctor step
8 down, though, I apologize to everyone. I would like to
9 approach the bench briefly, please. Can we do that?
10 THE COURT: Surely. We will do that in a
11 minute. We will take our morning recess at this time,
12 and then we don't have to be crawling all over
13 everything.
14 I would admonish the jury not to discuss
15 this case amongst yourselves or with anyone else. Do
16 not form or express any opinion on the matter until it's
17 finally submitted to you. We will be in recess for 15
18 minutes.

19
20 (The following proceedings were held
21 in open court outside the presence
22 of the jury:)

23
24 THE COURT: Yes, sir?

25 MR. PIUZE: All I want to do is the following:

26 A, for the record, an offer of proof. The
27 information that I wished to elicit was that
28 Mrs. Bullock expressed profound guilt, shame,

1963

1 embarrassment, and remorse, extreme remorse, over her
2 inability to quit smoking after numerous occasions.
3 Next, that this witness told her not to
4 get down on herself and explained his reasons why.
5 And I'd -- I may want to ask that one.
6 Is that allowable or not allowable?
7 THE COURT: The latter part he has already
8 testified to; and my understanding is that he told her
9 on numerous occasions not to get down on herself, that
10 he didn't shame her or make her feel inferior because

11 she was not able to quit smoking. I think that was his
12 testimony earlier, at least that's my recollection of
13 it.

14 If you wish to ask him that again, I have
15 no problem with that except for the fact that I think it
16 was repetitive and counsel may have some objections.

17 MR. PIUZE: I purposely backed off on the
18 question because I know included in there would be
19 things like, "You are addicted, you are hooked, this
20 stuff is highly addictive."

21 THE COURT: That's what he would say to her?

22 MR. PIUZE: Yes, sir.

23 THE COURT: I will not permit that; and I
24 appreciate you put that on the record and it should be
25 part of your record.

26 MR. PIUZE: I am not making a big deal of that
27 here. I'm just letting the court know that I spun the
28 question in a nice gentle way before to get around that.

1964

1 THE COURT: No. I mean the part of what she
2 would have testified if she was allowed to testify
3 should be on the record.

4 MR. PIUZE: Sure it should.

5 THE COURT: No question about it.

6 MR. PIUZE: Thank you.

7 Also what I'd like to do is mark that
8 medical record as Plaintiff's Exhibit 8511 -- excuse
9 me -- 8271.

10 THE COURT: 8271 is the entire record?

11 MR. PIUZE: Sure.

12 THE COURT: The entire chart?

13 MR. PIUZE: Yes, sir. And last --

14 THE COURT: Wait. 8271, entire chart of
15 plaintiff. Okay.

16 THE CLERK: I'm sorry. Which chart?

17 THE COURT: I will do it again.

18 THE CLERK: Okay.

19 THE COURT: 8271 is the entire chart of the
20 plaintiff from which pages 12291 through 12295 have been
21 extracted.

22 MR. PIUZE: Mr. Rivas, this is Camino Health
23 Center Chart.

24 THE CLERK: Thank you, Counsel.

25 THE COURT: Okay.

26 MR. PIUZE: Your Honor, I am not offering it at
27 this time, but I would like it marked.

28

1965

1 * (Marked for identification Joint
2 Exhibit number 8271, document.)

4 THE COURT: That's fine.

5 MR. PIUZE: What I propose to do is ask
6 Mr. Rivas to release this to my custody so I can make a
7 copy without all of my clips and everything else in it.

8 THE COURT: Okay.

9 MR. PIUZE: Last, I would ask that this witness
10 not be excused at this time in light of the court's
11 ruling about what might happen later, but I'd ask that
12 the witness certainly be allowed to leave at this time
13 because I have no further questions at this time.

14 MR. LEITER: No objections.

15 THE COURT: Do you understand what he is

16 saying?
17 THE WITNESS: Not really.
18 THE COURT: Okay. You go today.
19 THE WITNESS: Okay.
20 THE COURT: But you are still under order that
21 you may be asked to return at a later date if additional
22 testimony becomes necessary.
23 THE WITNESS: I see.
24 THE COURT: Okay. Thank you very much for
25 coming. We appreciate it. Make sure you unwire
26 yourself. Thank you very much, sir.
27 THE WITNESS: Sure.
28 MR. PIUZE: That's it.

1966

1
2 (A recess was taken in the proceedings.)
3
4 (The following proceedings were held
5 in open court within the presence of
6 the jury:)
7
8 THE COURT: The record will reflect the jury is
9 present and in the courtroom, all counsel are present.
10 Mr. Piuze, you may call your next witness.
11 MR. PIUZE: Plaintiff calls Phillip Wulff.
12 THE COURT: Mr. Wulff, would you be kind enough
13 to come right here next to where I am, face me, and
14 raise your right.
15 Do you solemnly state the testimony you
16 may give in the cause now pending before this court will
17 be the truth, the whole truth, and nothing but the
18 truth, so help you God?
19 THE WITNESS: I do.
20 THE COURT: Would you be seated. We are going
21 to give you a microphone, but it doesn't quite work the
22 way we'd like it to, so you are going to have to talk in
23 a loud, clear voice.
24 THE WITNESS: I have a pretty strong voice.
25 THE COURT: Normally people don't use it when
26 they are in here, for some reason or another. They all
27 have loud strong voices, and then they all start talking
28 softer and softer and nobody can hear them.

1967

1 (Laughter.)
2 THE COURT: So listen carefully to the questions
3 the lawyer asks of you. Answer only what he asks. Take
4 a heartbeat before you answer so that counsel on the
5 other side of the table can object if they wish; and if
6 they say "objection," you stop in the middle of a word
7 and just. . .
8 Make sure that you are not talking over
9 the questioner, because the court reporter can only take
10 one voice at a time. So it's important that you let him
11 finish and then you start your answer, and it's
12 important that he let you finish and then he starts his
13 question.
14 Now, for the record, would you state your
15 full name, and in a loud, clear voice spell both your
16 first and last name.
17 THE WITNESS: Okay. Full name is Phillip
18 Sheridan Wulff, Sr. Phillip is P-h-i-l-l-i-p. I will
19 skip the spelling of the middle one -- you want it?
20 S-h-e-r-i-d-a-n. Wulff, W-u-l-f-f.

21 THE COURT: Thank you, sir.
22
23 * PHILLIP S. WULFF, SR.
24 Called by the plaintiff as a witness, was sworn and
25 testified as follows:
26
27 THE COURT: Go ahead, please.
28 MR. PIUZE: Thanks.

1968

1
2 * DIRECT EXAMINATION
3
4 BY MR. PIUZE:
5 Q. Good morning.
6 A. Good morning.
7 Q. Sir, where do you live?
8 A. I live in [DELETE].
9 Q. Are you employed?
10 A. Yes, sir.
11 Q. By whom?
12 A. By the U.S. Government Department of the
13 Interior, the Bureau of Land Management.
14 Q. What do you do for the U.S. -- I can see
15 you are ready to jump on my question and it's only a
16 third of the way there.
17 What do you do for the U.S. Government
18 Department of the Interior, Bureau of Land Management,
19 please?
20 A. Well, I do a lot of different things, but
21 part of which I facilitate large meetings, especially
22 controversial-type issues. I work with conflict
23 resolution. I sometimes get involved in mediation;
24 disputes between people, two parties, sometimes groups,
25 that kind of stuff.
26 Q. What's your occupation or profession,
27 please?
28 A. Organizational development specialist is

1969

1 my title.
2 Q. Are you a psychologist?
3 A. Well, I don't really call myself a
4 psychologist. I have a master's degree in guidance and
5 counseling and additional work on my Ph.D, but I am not
6 a psychologist.
7 Q. Were you once married to Betty Bullock?
8 A. Yes, sir.
9 Q. When you were once married to Betty
10 Bullock, I guess her name must have been Betty Wulff?
11 A. Yes.
12 Q. Where did you grow up?
13 A. South Dakota; Watertown, Bryant, that
14 area. Eastern part.
15 Q. Most of us probably don't know much about
16 Watertown and Bryant, but why don't you give us a little
17 thumbnail. Are those little teeny farm towns, or are
18 those towns of 5,000 or what, please?
19 A. Well, I was born in Bryant. I lived there
20 the first ten years of my life, and it's a small town of
21 about 500 people; and then spent the rest of my growing
22 up in Watertown, a town of about 15,000. Rural
23 community, pretty much dependent on the agricultural
24 commodities they could raise.
25 Q. How old were you when you first knew Betty

26 Bullock?
27 A. It would have been 49 years ago now, 1953,
28 beginning of my sophomore year in high school. I was 15

1970

1 at the time.
2 Q. Were the two of you in the same grade?
3 A. Yes.
4 Q. Did you know Betty Bullock, do you
5 remember -- how many years did you go to Watertown High
6 School?

7 A. I went four years until I graduated in
8 '56.

9 Q. Okay. Did you know her -- whatever year
10 that you just gave me, would that make it that you knew
11 her two years or three years during high school?

12 A. Three years of high school. She came from
13 the Catholic school and moved in as sophomore because
14 they had nine years of Catholic school.

15 Q. Okay. While you knew her in Watertown,
16 were you ever her boyfriend or were you just a friend?

17 A. Boyfriend.

18 Q. Boyfriend?

19 A. You bet.

20 Q. During high school, did she take up
21 smoking?

22 A. My best recollection is, yes, to some
23 extent in -- the spring of '56, before we graduated,
24 there was a lot of kids experimenting with things like
25 smoking, and she did.

26 Q. Can you give the jury -- before I go
27 further, I bet you never took notes in 1956 about how
28 many cigarettes Betty Bullock was smoking so you could

1971

1 come back here 40-something years later and discuss it.

2 A. No. Sure didn't.

3 Q. Can you give the jury an idea, roughly,
4 how much you recall Betty Bullock smoking during the
5 senior year in high school.

6 A. Well, my best estimation would be
7 somewhere around a half a pack. I mean, you know, it's
8 casual use and special occasions type of thing like
9 parties, and we would party most of the time. You know,
10 we had our parties. Every evening we'd get together, a
11 bunch of kids, and get together and dance and have a
12 good time.

13 Q. Did you both graduate high school at
14 around the same time?

15 A. Yes. Same year, '56.

16 Q. Were you smoking in high school?

17 A. No.

18 Q. Before you ever got to high school, had
19 you done some experimenting with cigarettes?

20 A. Oh, yeah, as a little kid.

21 Q. How old were you when you did your
22 experiment?

23 A. This might sound crazy, but --

24 MR. LEITER: Objection. Relevance.

25 THE COURT: Sustained.

26 BY MR. PIUZE:

27 Q. During the time that you knew Betty
28 Bullock during high school, would it be true to say you

1972

1 didn't smoke cigarettes?

2 A. That's right.
3 Q. When she graduated from high school, did
4 she leave Watertown, South Dakota?
5 A. Yes.
6 Q. For California?
7 A. Yes.
8 Q. Did you stay in South Dakota?
9 A. Yes.
10 Q. When is the next time you saw her, please?
11 A. It would have been early summer of '57.
12 Q. The year after getting out of high school?
13 A. Right.
14 Q. Did you see her like one time when you
15 were passing on the street, or did you see her regularly
16 that summer?
17 A. Regularly that summer.
18 Q. Was she still smoking cigarettes?
19 A. Yes.
20 Q. Approximately with what frequency?
21 A. Well, it's hard to recollect, but I do
22 remember that there was an increased use when she came
23 back from California; and she had changed in the sense
24 that she was -- not necessarily for the better. I guess
25 that's the best I can say. A little more calloused as a
26 person and. . .
27 Q. All right. Not -- no longer a little farm
28 girl?

1973

1 A. Right.
2 Q. Now a Californian.
3 (Laughter.)
4 Q. Anyway, did you -- do you think now,
5 looking back on it, that when you saw her the year after
6 she graduated from high school and you spent time with
7 her that summer, that she was smoking more than she had
8 been before?
9 A. Yes. I would say that she probably was,
10 to my best recollection, was smoking more when she came
11 back than what she did when she left.
12 Q. At the end of that summer, did she leave
13 South Dakota again?
14 A. Yes. Yes. We both left South Dakota at
15 that time.
16 Q. And did you both head for California?
17 A. Well, I joined the Marine Corps with some
18 friends of mine and I was stationed in San Diego, and
19 she came to Southern California with some girlfriends at
20 that time.
21 Q. So you both wound up in Southern
22 California but very different kinds of places?
23 A. Yes. She was in Pasadena. I was in
24 San Diego.
25 Q. How long were you in the Marine Corps,
26 please?
27 A. Three years.
28 Q. And during the time you were in the Marine

1974

1 Corps, where were you stationed?
2 A. I was at Camp Pendleton and later at
3 Marine Recruit Depot.
4 Q. And was the Marine Corps Recruit Depot
5 someplace in the San Diego area?
6 A. Yes.

7 Q. During the time, the three years that you
8 spent in the Marine Corps here in Southern California,
9 did you have occasion to see Betty Bullock in Southern
10 California?
11 A. Almost every weekend, yes.
12 Q. Would you come up here to see her, would
13 she go down there to see you, or a little of both?
14 A. No. I would go up there pretty much.
15 Q. During those three years, what part of
16 Southern California did she live in?
17 A. She lived in Pasadena and North Hollywood
18 for a while.
19 Q. Okay. Over the course of three years, did
20 she smoke?
21 A. Yes.
22 Q. Can you give the jury an idea of the
23 frequency or regularity with which she smoked during
24 those three years, please.
25 A. Well, it seemed like to me that, like a
26 lot of habits in life, become more prevalent as we -- as
27 we have them, and it seems like to me it was a gradual
28 increase. So it seems to me it was like more than a

1975

1 half a pack at that time.
2 Q. Okay. Aside from -- I'm not trying to get
3 you in any direction. I am not trying to push you
4 anyplace.
5 Aside from telling the jury that it was
6 probably more than a half a pack, can you go beyond that
7 or just leave it at that?
8 A. I think it's safe to say that she smoked
9 at least a half a pack.
10 Q. Okay. Now, were you a fan of smoking
11 cigarettes?
12 A. No, sir.
13 Q. Did you in 1957, '58, '59, are those the
14 three years you were in the Corps?
15 A. Yes. Got out in '60.
16 Q. From whenever it was in '57 that you went
17 in until you got out in '60, can you say that during
18 that whole period of time you didn't like smoking
19 cigarettes?
20 A. I didn't smoke. I didn't like it.
21 Q. Had you grown up in a house where your
22 parents smoked cigarettes?
23 A. Both parents smoked. My sister smoked.
24 Q. Did you -- during those years that you
25 were in Southern California in the Marine Corps, did
26 Betty Bullock know that you didn't particularly like
27 smoking?
28 A. Well, you know, smoking was a little

1976

1 different in those days. I didn't particularly like it,
2 but it --
3 MR. LEITER: Objection. Nonresponsive.
4 THE COURT: Remember, when objections come in,
5 you stop.
6 Go ahead.
7 MR. LEITER: Non-responsive.
8 THE COURT: Sustained.
9 The question again: Did you during those
10 years that you were in Southern California in the Marine
11 Corps let Betty Bullock know that you didn't

12 particularly like smoking? The answer to that can be
13 yes, no, or "I don't remember."
14 THE WITNESS: It's yes.
15 THE COURT: Go ahead.
16 BY MR. PIUZE:
17 Q. As my question progresses, and I know
18 where they are going, would it be fair to say with the
19 passage of time, you let her know more strongly that you
20 didn't like smoking?
21 A. Yes, sir.
22 Q. All right. Anyway, the kinds of things
23 that you would say to her about your dislike for
24 smoking, would they include, "Don't smoke cigarettes
25 because they are a health risk"?
26 MR. LEITER: Objection to the leading.
27 THE COURT: Sustained.
28 BY MR. PIUZE:

1977

1 Q. Tell the jury the subject matters -- tell
2 the jury why you didn't like smoking.
3 A. Well --
4 THE COURT: Excuse me. Why he didn't like
5 smoking?
6 MR. LEITER: Objection. Relevance.
7 THE COURT: It is irrelevant.
8 THE WITNESS: Okay.
9 BY MR. PIUZE:
10 Q. Tell the jury the reasons you gave to
11 Betty Bullock for why you didn't like smoking.
12 A. I didn't like the way it looked. I didn't
13 like the way it smelled. I didn't like the after-effect
14 of it. I didn't like kissing an ashtray. Those kinds
15 of things.
16 Q. Sounds like you were pretty definite about
17 that.
18 A. Yeah.
19 Q. At any time from '57 to '60, did you ever
20 give her any dislikes that had anything to do with
21 health?
22 A. I don't recall focusing on health. I may
23 have said something to the effect that it isn't good for
24 you. It does no benefit. "It does you no good." But
25 we didn't know much about health in those days relative
26 to that issue.
27 MR. LEITER: Objection. Move to strike the last
28 sentence.

1978

1 THE COURT: The last sentence is stricken. It
2 is beyond the answer and it is not responsive.
3 THE WITNESS: Okay.
4 BY MR. PIUZE:
5 Q. I think ultimately we will get where we
6 are going faster if we go in small bites.
7 A. Okay.
8 Q. And so let me jump ahead now.
9 Later, after you are out of the Marine
10 Corps and subsequent years when you and Ms. Bullock were
11 together, did your -- did your statements to her about
12 your dislike for cigarettes get stronger?
13 A. I believe so.
14 Q. And as we go further in the story, did
15 your statements to her about your dislike for cigarettes
16 contain the same basic reasons that you have just told

17 us?
18 A. Yes.
19 Q. And subsequently, as the story will go
20 forward, did your statements about why you dislike
21 smoking continue not to focus on health?
22 A. Yes.
23 Q. The reason for the latter, please, the
24 reason your statements didn't focus on health?
25 MR. LEITER: Objection. Relevance.
26 THE COURT: Sustained.
27 BY MR. PIUZE:
28 Q. Well, in 1957 or '58 or '59-60, was there
1979
1 any big deal, as far as you were concerned, about the
2 effects of smoking on health?
3 MR. LEITER: Same objection.
4 THE COURT: Sustained.
5 BY MR. PIUZE:
6 Q. And in 1960 and '61 and '62 and '63 and
7 1964, was there any big deal, as far as you were
8 concerned, about the effects of smoking on health?
9 MR. LEITER: Same objection.
10 THE COURT: Sustained.
11 BY MR. PIUZE:
12 Q. So anyway, you failed to make general, you
13 were mustered out, and where did you go?
14 A. Back to South Dakota, back to school.
15 Q. Did Betty Bullock go with you?
16 A. Yes. We were married in February of '60,
17 and I got out in June of '60.
18 Q. When you went back to South Dakota to go
19 to school, where did you go?
20 A. Back to Brookings, South Dakota State
21 College.
22 Q. How many years were you and Ms. Bullock
23 together back in -- I guess I should say how many years
24 were you and Mrs. Bullock together back in South Dakota?
25 A. Three years.
26 Q. And were those three years in Brookings?
27 A. Yes.
28 Q. Were you a student during that entire
1980
1 period of time?
2 A. Yes.
3 Q. What did she do during that period of time?
4 A. She worked.
5 Q. What did she do, can you recall?
6 A. Yes. She worked at the college in the
7 beginning of the computer business, a card-punch
8 operator, and she worked sometimes in the evening at --
9 in Brookings.
10 Q. Did she work in the evening as a waitress?
11 A. Yes.
12 Q. Did your folks own a motel?
13 A. Yes.
14 Q. Did the two of you sometimes help out at
15 the motel?
16 A. Yes.
17 Q. Doing what?
18 A. Anything that needed to be done; making
19 beds or washing stuff or whatever, checking people in.
20 Q. Did your mom, during this period of time,
21 smoke?

22 A. Yes.
23 Q. Did you sometimes criticize your mom in
24 front of Betty Wulff for smoking?
25 A. Yes.
26 Q. Were your reasons the same general reasons
27 you've already told the jury about in regard to Betty?
28 A. Yes.

1981

1 Q. Were some of your criticisms of your mom
2 for smoking sometimes said in front of Betty?
3 A. Yes.
4 Q. Do you have any recollection of Betty's
5 reactions, if any, to your criticisms of your mom for
6 smoking?
7 A. I don't have any. That's a long time ago.
8 Q. It is. When was Jodie born?
9 A. She was born in September 1960.
10 Q. Did Betty smoke during her pregnancy?
11 A. Somewhat.
12 Q. Explain that, please.
13 A. Well, she had morning sickness that would
14 limit her desire for cigarettes and so --
15 Q. I'm sorry.
16 A. -- so consequently she smoked less during
17 that time.
18 Q. Do you have any recollection of her
19 quitting completely during her pregnancy?
20 A. No.
21 THE COURT: You have to wait until he finishes
22 his question.
23 THE WITNESS: Okay.
24 No, I don't.
25 BY MR. PIUZE:
26 Q. Ultimately, did you and Betty get
27 divorced?
28 A. Yes.

1982

1 Q. When did you part, the two of you?
2 A. It would have been October of '63.
3 Q. At that time, October of '63, can you give
4 the jury an indication, your best recollection, of the
5 frequency with which she smoked cigarettes.
6 A. My best recollection would be close to a
7 pack a day.
8 Q. Now, since 1963, give us an idea, please,
9 about the amount of times and the circumstances under
10 which you have been in contact with your ex-wife.
11 A. Well, I would say it was probably
12 annually, at least, if not more frequent for the first
13 few years and then kind of fizzled out; and I am trying
14 to remember what year that would have been; probably the
15 late Seventies, we really had no contact to speak of for
16 a long time, for many years.
17 Q. Since the late 1970s up until today, how
18 many times have you seen Betty?
19 A. Once.
20 Q. The circumstances, please?
21 A. There was a class reunion in 1996 back in
22 Watertown.
23 Q. Aside from that class reunion, I take it
24 if you saw her, you exchanged words?
25 A. Yeah.
26 Q. Aside from the one time when you saw her

27 since the late Seventies, have you had any other
28 occasion to even talk to her since the late Seventies?

1983

1 A. She called me once in '97, and that's the
2 last time I've talked to her.

3 Q. Since the late Seventies, would it be
4 correct, then, that you had one phone call and one
5 meeting at a class reunion with Ms. Bullock?

6 A. Yes.

7 Q. Sometime in the last year and a half or so
8 were you contacted by investigators for Philip Morris?

9 A. Yes.

10 Q. On the telephone?

11 A. Yes.

12 Q. And they wanted to talk to you about some
13 issues regarding Ms. Bullock's past?

14 A. Uh-huh.

15 THE COURT: Is that a yes?

16 THE WITNESS: Yes.

17 THE COURT: Thank you.

18 BY MR. PIUZE:

19 Q. Did you give them a statement?

20 A. They interviewed me on the phone, and I
21 responded to their questions the best I could.

22 Q. Is it your thought that that conversation
23 was recorded?

24 MR. LEITER: Objection.

25 THE WITNESS: I don't know for sure.

26 THE COURT: Objection. That means you stop and
27 I have a turn.

28 I'm sorry?

1984

1 MR. PIUZE: I will withdraw the question.

2 MR. LEITER: Relevance. No good-faith basis.

3 MR. PIUZE: I will withdraw the question.

4 THE COURT: Okay.

5 MR. PIUZE: Let me confer here for a second.

6 (Counsel conferred sotto voce.)

7 MR. PIUZE: I have no further questions.

8 THE COURT: Cross-examination.

9 MR. BLEAKLEY: Can we have just a moment?

10 THE COURT: Yes.

11 (A pause in the proceedings.)

12

13 * CROSS-EXAMINATION

14

15 BY MR. LEITER:

16 Q. Good morning, sir.

17 A. Good morning.

18 Q. I just have a few questions for you.

19 About a year ago, ten months ago, you
20 spoke with a lawyer from my office; isn't that right?

21 A. Uh-huh. There was more than one.

22 Q. A lawyer and a paralegal, right?

23 A. Okay.

24 Q. Asked you some questions and you gave some
25 answers?

26 A. Uh-huh.

27 Q. Yes?

28 A. Yes.

1985

1 Q. Okay. 1956 was a long time ago, right?

2 A. That's right.

3 Q. And you offered some testimony about how
4 much Betty smoked in high school in 1956, right?
5 A. I believe that we probably got into that.
6 It's been a while. I don't have a real good
7 recollection of all the questions they asked me.
8 Q. Actually I'm talking about just a few
9 minutes ago you were asked about that.
10 A. Oh, yes. Yes.
11 Q. Okay. Would it surprise you if Betty --
12 I'm calling her Betty just so we don't get caught up in
13 last names.
14 A. That's all right.
15 Q. I apologize for being too familiar.
16 Would it surprise you if Betty's testimony
17 about her smoking in high school was different than what
18 you just said?
19 A. Yeah, it would surprise me.
20 Q. Okay. And it would surprise you if her
21 testimony about her smoking in the late Fifties is
22 different from what you just said?
23 A. It's possible.
24 Q. A long time ago?
25 A. Yeah.
26 Q. Okay. Now, when you were married, you
27 were at school, right?
28 A. Uh-huh, yes.

1986

1 Q. She was working a day job?
2 A. Uh-huh. Yes.
3 Q. And she was working a night job?
4 A. Yes. Sometimes. Part of the time.
5 Q. All right. And you didn't really see each
6 other all that much?
7 A. Well, pretty busy time, yes.
8 Q. You didn't see each other all that much?
9 A. That's right. Yes.
10 Q. And she also has said that she didn't
11 smoke around you; isn't that right?
12 THE COURT: Wait, wait, wait.
13 And she also has said that she didn't
14 smoke around you?
15 MR. LEITER: I am going to withdraw that
16 question and start a different one.
17 THE COURT: Good.
18 BY MR. LEITER:
19 Q. And she did not smoke around you, did she?
20 A. Well, somewhat. She didn't -- I can't say
21 that she didn't smoke around me. She smoked around me
22 somewhat, sometimes. It wasn't like it was hidden.
23 Q. It wasn't?
24 A. No.
25 Q. Okay. And you mentioned that you haven't
26 seen Betty very much since the divorce in 1963; is that
27 right?
28 A. That's right.

1987

1 Q. Okay. And Jodie is your daughter?
2 A. Yes.
3 Q. Have you been in touch with Jodie over the
4 years?
5 A. Yes.
6 Q. How regularly?
7 A. Not as regular as we should. I really

8 can't tell you. I don't know. Annually or maybe it
9 would average out to be annually.
10 Q. When was the last time you spoke with her?
11 A. Oh, just this morning I had breakfast with
12 her.
13 Q. She asked you to come testify here in this
14 trial?
15 A. She didn't ask me.
16 Q. Okay. Who did?
17 A. I was called by Paula who works for
18 Michael; and, yes, I said I'll come down.
19 Q. When you had breakfast with Jodie this
20 morning, did you talk about your testimony here today?
21 A. No.
22 MR. LEITER: No further questions.
23 THE COURT: Anything further on redirect?
24 MR. PIUZE: No.
25 THE COURT: Thank you, sir. We appreciate your
26 coming. You are free to leave. Make sure we get the
27 microphone and the --
28 THE WITNESS: That would be a good idea.

1988

1 THE COURT: Yes.
2 MR. PIUZE: Your Honor, this witness can be
3 excused.
4 THE COURT: You are, therefore, excused. I
5 appreciate your being here.
6 Call your next witness, please.
7 MR. PIUZE: This is Merryman.
8 THE COURT: Give me a moment.
9 MR. BLEAKLEY: No, your Honor.
10 THE COURT: Excuse me?
11 MR. BLEAKLEY: We have not agreed on the
12 portions of the Merryman testimony.
13 THE COURT: You are talking about a reading?
14 MR. PIUZE: Three live witnesses today. The
15 next one is this afternoon at 1:30. I propose to read
16 Merryman's testimony from the Minnesota trial.
17 THE COURT: Okay. Hold on. Just give me a
18 second.
19 Counsel, you can approach the bench while
20 I am trying to find this.
21
22 (The following proceedings were held
23 at sidebar:)
24
25 THE COURT: This is past trial testimony
26 regarding the organization, et cetera.
27 What is the objection?
28 MR. BLEAKLEY: Well, the objection, your Honor,

1989

1 is that we were led to believe that Mr. Merryman's
2 testimony would be read.
3 Dr. Vandermolen, who is the next live
4 witness, I have had -- the reason it makes a difference
5 is Mr. Piuze and I have not yet had a meet and confer
6 about what objections will be withdrawn and what
7 objections won't be withdrawn.
8 At the close of business yesterday, I
9 handed to Mr. Piuze a piece of paper with the objections
10 that we were withdrawing and the objections that we were
11 not withdrawing.
12 THE COURT: Okay.

13 MR. BLEAKLEY: During the break at 10:15,
14 Mr. Goldstein told me that he was going to recommend to
15 Mr. Piuze that certain of those be agreed to and that
16 certain of them not be agreed to, and we said we would
17 meet at lunch.

18 THE COURT: Okay.

19 MR. BLEAKLEY: There will be portions of that
20 testimony to which we will continue to have an
21 objection, and I would like to be heard, your Honor,
22 before they are read, but we haven't even had the meet
23 and confer yet.

24 THE COURT: Okay.

25 MR. PIUZE: First, your Honor --

26 THE COURT: Yes?

27 MR. PIUZE: -- we provided designations on what
28 we wanted to read weeks and weeks ago, if not months

1990

1 ago. We got the objections yesterday.

2 MR. BLEAKLEY: Not so.

3 THE COURT: Let him finish and then you can have
4 a turn. Go ahead.

5 MR. PIUZE: Okay. Well, I got Mr. Bleakley's
6 objections yesterday, probably at the close of business,
7 and it contained one group of objections which were sort
8 of a bargaining chip and another one which he was
9 serious about.

10 Mr. Goldstein has my full authority to
11 make deals, and the meet and confer, as far as I'm
12 concerned, has occurred; and the stuff that
13 Mr. Goldstein gave on, he gave with my authority; and
14 the stuff that Mr. Goldstein didn't give on, he did not
15 give on with my authority.

16 I presume that the court will rule on the
17 objections as the questions came up.

18 THE COURT: That was going to be my question.
19 Why can't we just assume that this is a live witness?
20 What difference does it make? You have a transcript,
21 he has a transcript, and I am going to get a transcript.

22 MR. PIUZE: Sure.

23 THE COURT: And when we get to a particular
24 place, as we did yesterday, that has not been agreed
25 upon that's in this area that -- I mean, those that have
26 been agreed upon to be withdrawn, I just heard Mr. Piuze
27 say they are withdrawn; and those that have not, I have
28 heard him say they are not withdrawn and we are going to

1991

1 go forward.

2 You are going to make an objection. It
3 may very well be an appropriate objection, and when you
4 do, you will voice it and I will rule on it.

5 MR. BLEAKLEY: Judge, I don't want to throw
6 darts. So far we have managed not to have that, and I
7 am not interested in doing it now. I am telling your
8 Honor that we provided our objections to those
9 designations weeks ago.

10 THE COURT: I am going to assume you are right,
11 but what difference does it make?

12 MR. BLEAKLEY: I am going to explain that to
13 you.

14 THE COURT: Why?

15 MR. BLEAKLEY: Because I have not reached an
16 agreement with Mr. Goldstein. During the break
17 Mr. Goldstein expressly told me that he did not have the

18 authority to make a deal.
19 THE COURT: Then let's pretend there is no
20 objection on anything.
21 MR. BLEAKLEY: I don't have the -- even have the
22 material here in the courtroom because I thought that at
23 noon, we would have a meet and confer.
24 THE COURT: That's not difficult.
25 MR. PIUZE: And, excuse me, that's one other
26 thing. I don't intend to throw darts and I -- like
27 you -- but you misunderstood because I --
28 THE COURT: Folks, we are wasting time. I

1992

1 don't care about this little back and forth.
2 MR. PIUZE: You are right.
3 THE COURT: I want to move this trial along.
4 MR. BLEAKLEY: Judge, I don't even have --
5 THE COURT: We will give you one.
6 MR. BLEAKLEY: I have to have my notes.
7 THE COURT: Where are your notes?
8 MR. BLEAKLEY: They may have been brought over
9 to the courtroom.
10 THE COURT: Let's find out.
11 MR. BLEAKLEY: Please let me finish here because
12 this is important.
13 THE COURT: Okay.
14 MR. BLEAKLEY: What happened during the break is
15 Mr. Goldstein said to me, "I am going to recommend to
16 Mr. Piuze that he accept."
17 Now, I didn't take notes of that because
18 the understanding that I had with Mr. Goldstein was that
19 at the lunch break, we would sit down together and
20 agree.
21 THE COURT: I appreciate that and I don't care.
22 MR. BLEAKLEY: Except that I need time to do
23 it.
24 THE COURT: That is a different issue.
25 MR. BLEAKLEY: I do have one other point to make.
26 THE COURT: I want to deal with this one.
27 It seems to me that this is testimony that
28 has come from another trial. It has been on this list

1993

1 from the day that I got it. I don't care whether you
2 worked out some questions that are going to be withdrawn
3 and some are not. As far as I'm concerned, they all can
4 be asked, and I will rule on the objections as they are
5 made, so that isn't going to worry me.
6 Now, what does bother me, and I will give
7 latitude, is if you say to me "but my notes are not
8 here." If they are not here, we will deal with it a
9 little differently. If they are here, let's get them
10 and let's get started.
11 MR. BLEAKLEY: I am still going to need a few
12 minutes, Judge.
13 THE COURT: Of course you will need a few
14 minutes. I will give you a few minutes.
15 MR. BLEAKLEY: May I make one other point?
16 THE COURT: Yes, you may.
17 MR. BLEAKLEY: Two other points, actually.
18 The first other point is that the
19 objection -- I know what Mr. Piuze's answer is going to
20 be to my objection to some of this testimony; and it is
21 going to be that it wasn't objected to during the
22 Minnesota trial; therefore, it's waived.

23 THE COURT: Okay.
24 MR. BLEAKLEY: I want to make an argument to the
25 court in response to that, and I can't do it on the
26 record in front of the jury.
27 THE COURT: You don't have to. We will do it
28 afterwards on the record. You will make your record. I

1994

1 am going to tell you now that if the -- if it was at the
2 trial, if it was a trial wherein there was a lawyer for
3 Philip Morris and the lawyer didn't make an objection, I
4 am going to take the position that I took before, and
5 that is that comes in.

6 Now, if you want to, as Mr. Piuze did
7 quite properly, go to the -- after we have this in and
8 we have now got it on the record, that you want to do it
9 before the questioning, and I am not going to let you do
10 that to waste the time. You can make any kind of record
11 you want, and it will go with this case to whatever
12 appellate court wants to hear it.

13 MR. BLEAKLEY: But, Judge, the reason I want to
14 make the argument to you before is because there's a
15 possibility that I might convince you.

16 THE COURT: Okay. There is certainly that
17 possibility, and it isn't going to happen. I have made
18 a ruling on that issue, and I'm not going to change it
19 in the middle of the trial.

20 MR. BLEAKLEY: Can I make the argument now then?

21 THE COURT: Sure.

22 MR. BLEAKLEY: Okay. I was the lawyer at that
23 trial. I was the lawyer who was with Mr. Merryman. I
24 was the lawyer who defended him during his testimony. I
25 was the lawyer whose responsibility it was to make
26 objections or not make objections.

27 Now, what happened during that trial is
28 that no objections were sustained to anything no matter

1995

1 how far afield the roaming went, no objections were
2 sustained; and as the trial lawyer, the lead trial
3 lawyer in that case, I had to make the judgment that all
4 of us who try cases make from time to time, which is
5 that you simply cannot object over and over and over
6 again.

7 Now, I understand you can take the
8 position that that's waiver, but let me give you an
9 example of the kind of thing that was being done during
10 that trial and which I finally had to make a tactical
11 decision that I am not going to keep objecting and have
12 the jury think I am an obstructionist.

13 The questions about how you feel and what
14 you feel is the corporation's responsibility and do you
15 think they have a duty for a man who wasn't even in the
16 tobacco industry at the time, if the rule, the automatic
17 and unwaivering rule is that the objection is not made
18 at the time, it is waived forever, it means essentially
19 we have the lowest common denominator no matter how
20 outrageously a trial is being handled.

21 If the objection wasn't made, it is
22 forever waived and you're stuck with it. I don't think
23 that's fair, and I think there should be exceptions to
24 the waiver rule.

25 THE COURT: Mr. Leiter found an exception to
26 that rule by saying may we have a running objection on
27 this particular issue throughout the trial, and then he

28 made his record and he didn't have to keep repeating it

1996

1 again and again.

2 MR. BLEAKLEY: We were not allowed.

3 THE COURT: Well, you show me that --

4 MR. BLEAKLEY: I was not allowed by that judge
5 to have continuing objections.

6 THE COURT: Well, again, I need to see that, if
7 you have transcript where that was said. See, here is
8 the problem. I can't go back -- put myself back in
9 time. Now, it is true that if you fail to make an
10 objection, the question is going to be allowed to be
11 asked; however -- and I said this before -- if the
12 answer is not responsive to the question and, for
13 example, the question is, is there a reason -- no. Let
14 me -- was there a corporate policy against having
15 filtered cigarettes and the witness answers the
16 president of the corporation was a representative of the
17 American Nazi Party and part of our process was to kill
18 off the American people, that answer, I don't care what
19 the objection is, is so non-responsive and so
20 prejudicial I would entertain an objection on it.

21 But if you are saying to me that there are
22 a series of legitimate questions that are being asked
23 that you came up with a tactical decision --

24 MR. BLEAKLEY: That is not my position. My
25 position is that the questions were not legitimate.
26 They never should have been allowed. They were
27 argumentative. They were making closing argument over
28 and over and over again; and when I objected, my

1997

1 objections were overruled.

2 When I asked for standing objections, I
3 was told, "There will be no such standing objections.
4 If you want to, you will do it on the record." And I
5 ultimately made the decision that I could not appear
6 before this court, that jury, to be an obstructionist.

7 THE COURT: Okay. But you put Mr. Piuze and the
8 court in an impossible position of having to say, well,
9 if he was able to -- if he chose to make an objection
10 and it was on the record, then we could deal with it.

11 MR. BLEAKLEY: Judge, if you saw these questions
12 and answers, you would know what I am talking about; and
13 you are not going to see them now. You are going to see
14 them when they are read in this courtroom.

15 THE COURT: Mr. Piuze, do you want to be heard?
16 I can't see --

17 MR. BLEAKLEY: I am going to put my objections
18 on the record.

19 THE COURT: Of course, you can. They are on the
20 record, and that is what we are doing and you can.

21 MR. BLEAKLEY: I want them on the record at this
22 time.

23 THE COURT: Absolutely.

24 MR. BLEAKLEY: And I want to put grounds on the
25 record.

26 THE COURT: We will see how far you can go.

27 MR. BLEAKLEY: I can argue. I will say
28 "argumentative."

1998

1 THE COURT: Of course you can say that.

2 MR. BLEAKLEY: The second -- this is a minor
3 point, but one I think is important; and that is, I

4 don't think there is any reason in the world why this
5 jury needs to know that Mr. Bleakley was the lawyer in
6 that trial.

7 THE COURT: I don't either.

8 MR. BLEAKLEY: And so I don't think that either
9 Mr. Goldstein or Mr. Piuze -- and I am not suggesting he
10 was going to, because we have already had this
11 discussion and he basically agreed not to do it.

12 MR. PIUZE: I don't recall that discussion.

13 THE COURT: It's not relevant.

14 MR. PIUZE: It isn't. It's my suggestion that
15 every time it says on the transcript "Mr. Bleakley," we
16 insert the name "Leiter" instead.

17 MR. BLEAKLEY: He is being funny now.

18 THE COURT: I understand that, and we are
19 wasting valuable time.

20 MR. PIUZE: We are.

21 MR. BLEAKLEY: This is important.

22 THE COURT: Well, it is -- I am not saying it is
23 not important. You have made your record as to why you
24 chose not to do the objections at the trial. If I
25 understand correctly, what we are going to hear -- stop
26 me if I'm wrong -- are questions to which there was no
27 objection, correct?

28 MR. BLEAKLEY: There are somewhere. They were

1999

1 overruled.

2 THE COURT: No, no. If they are overruled, I am
3 more than happy to revisit that and make my own ruling.
4 If there was an objection, I will make a ruling on it.

5 MR. BLEAKLEY: I hear you.

6 THE COURT: If there was no objection, I am
7 going to have to assume that, as a tactical matter,
8 Counsel chose not to do it. You have given on the
9 record your tactics for doing it, and they may be
10 exactly right or they may be the product of hindsight as
11 to why you didn't do it.

12 MR. BLEAKLEY: Or even incompetence.

13 THE COURT: It could be. It could be any number
14 of things, including seeking a reversal on appeal on the
15 ground that improper material came in. I don't know. I
16 wasn't there.

17 MR. BLEAKLEY: I hear you.

18 THE COURT: Okay. Let's go.

19 MR. BLEAKLEY: But I still need -- we don't have
20 an agreement, although I suspect we will -- I need a few
21 minutes.

22 THE COURT: I don't care about an agreement.

23 MR. BLEAKLEY: I do, because if we have one, I'd
24 like to memorialize it. Mr. Piuze says that
25 Mr. Goldstein has authority. I need to go back and look
26 at that.

27 THE COURT: Here is the answer.

28 MR. BLEAKLEY: It will take me about ten minutes.

2000

1 THE COURT: No, it isn't. Here is the answer to
2 that: If Mr. Piuze has an agreement not to ask a
3 question, you will know about it because he won't ask
4 the question. As he has done consistently throughout
5 the trial, where there has been an agreement, he puts
6 his witness on the stand and the witness says, "No, we
7 are not going to cover that." So then you will know.

8 If there is no agreement, then he will ask

9 the witness, and then you can do with it what you want.
10 You can make your objection or do whatever you want to
11 do.
12 MR. BLEAKLEY: May I have a few minutes?
13 THE COURT: Well, it's now -- if you have a few
14 minutes, we might as well go through the noon hour.
15 MR. BLEAKLEY: I don't even have my materials
16 yet.
17 THE COURT: That is a different issue. If you
18 don't have your materials, without question you will get
19 time.
20 MR. BLEAKLEY: And I need a few minutes.
21 THE COURT: How much is a few minutes?
22 MR. BLEAKLEY: If they are here, I need about
23 five minutes.
24 THE COURT: All right. Let's find out if they
25 are here. Let's do that first. Just everybody stay
26 right here. I don't want to have people roaming
27 around.
28 (A pause in the proceedings.)

2001

1
2 (The following proceedings were held
3 in open court within the presence of
4 the jury:)
5
6 MR. BLEAKLEY: I'm sorry, your Honor. I just
7 need a couple more minutes.
8 THE COURT: Go ahead.
9 (A pause in the proceedings.)
10
11 (The following proceedings were held
12 at sidebar:)
13
14 MR. LEITER: Can I make a suggestion that I am
15 just making up as I am standing here?
16 THE COURT: That's what lawyers do.
17 MR. LEITER: Sometimes better than others.
18 Is it my understanding, Mr. Piuze, that
19 you are going to put Mr. Vandermolen on the stand right
20 after lunch?
21 MR. PIUZE: 1:30.
22 MR. LEITER: This is, I assume, going to take
23 more than a half hour?
24 MR. PIUZE: It is.
25 MR. LEITER: What if we broke from 11:30 to 1:00
26 instead of 12:00 to 1:30, put Vandermolen on the stand
27 after lunch for however long it takes, give Mr. Bleakley
28 time to look through the material, and then do this

2002

1 after?
2 THE COURT: What do you say?
3 MR. PIUZE: Vandermolen will be here at 1:30,
4 not 1:00.
5 THE COURT: Okay.
6 MR. PIUZE: Beyond that, I am neutral. Anything
7 you want to do.
8 MR. LEITER: I tried.
9 THE COURT: That's fine.
10 (A pause in the proceedings.)
11
12 (The following proceedings were held
13 in open court within the presence of

14 the jury:)

15

16 THE COURT: Let me tell you what we have been
17 doing and give our apologies.

18 The next live witness will be here at
19 1:30. We have, however, testimony to be read from a
20 prior trial. In most cases, the testimony that has
21 been -- that is coming to us from a prior trial has been
22 discussed between the two sides, and you may have heard
23 during the role-playing that we did to get that previous
24 witness before you where one lawyer or -- where the
25 person who was the witness was saying, "No, no, we are
26 going to skip that part."

27 Well, we haven't got to that on this
28 witness, and so you are going to hear some

2003

1 interruptions. I am going to have to look at it, and I
2 am going to have to make a ruling; but let's get through
3 as much as we can until noon, and then we will see where
4 we are.

5 So call your witness and tell me -- who is
6 the next witness so the jury will know who the person
7 is?

8 MR. PIUZE: Walker Merryman.

9 THE COURT: Would you spell that for us.

10 MR. PIUZE: M-e-r-r-y-m-a-n.

11 THE COURT: All right. And will you give us the
12 designation or title, if you will, of Mr. Merryman.

13 MR. PIUZE: Vice-president of The Tobacco
14 Institute.

15 THE COURT: Okay. Hold on. VP of The Tobacco
16 Institute.

17 And you have for me this -- okay. Thank
18 you. And this testimony is testimony from a previous
19 trial conducted in Minnesota; and can you tell me when
20 that was?

21 MR. PIUZE: Yes. This testimony starts on
22 February 6, 1998.

23 THE COURT: In Minnesota. All right. And
24 Mr. Merryman's surrogate will come up and have a seat,
25 pinning the microphone on himself.

26 MR. PIUZE: Mr. Merryman's surrogate is again
27 Mr. Goldstein.

28 THE COURT: Everybody wants him to read it.

2004

1 (Laughter.)

2 THE COURT: And who are you -- well, forget it.
3 You are going to begin as the lawyer for the plaintiff,
4 or you are going to begin as the lawyer for the tobacco
5 industry?

6 MR. GOLDSTEIN: Plaintiff.

7 MR. PIUZE: This witness was called by
8 Mr. Ciresi, C --

9 THE COURT: I don't care about his name. That's
10 the plaintiff's lawyer, correct?

11 MR. PIUZE: It is.

12 THE COURT: All right. That's fine. You may
13 begin. Just give us the page and the line where you are
14 going to start.

15 MR. PIUZE: 2692 is the page.

16 THE COURT: Okay.

17 MR. PIUZE: I bet you are all looking forward to
18 this.

19
20 (Whereupon the testimony of Walker Merryman
21 was read on open court.)
22
23 Q. Good afternoon, Mr. Merryman.
24 A. Good afternoon.
25 Q. You and I have never -- you and I haven't
26 met before, sir?
27 A. We have not.
28 Q. You are employed by The Tobacco Institute?

2005
1 A. Yes, sir.
2 Q. You have been employed by The Tobacco
3 Institute since approximately 1976; correct?
4 A. Yes, sir.
5 Q. Before that you were a -- is it a TV
6 announcer?
7 A. I was a newsman.
8 Q. Okay. And that was down in Iowa?
9 A. Among other places. Iowa, South Dakota,
10 Nebraska. Yes, sir.
11 Q. And how long were you a newsman?
12 A. I served in that capacity in a number of
13 places for about five or six years.
14 THE COURT: Counsel, let me ask a question.
15 When we did this before, before we got to real kernels,
16 we were inundated by pap; and I don't want to know and I
17 don't think this jury wants to know what it is like
18 growing up as a newsman in South Dakota or Iowa.
19 Let's get to what is important to this
20 case and eliminate the stuff that doesn't have anything
21 to do with it, otherwise we are just going to be reading
22 nonsense.
23 MR. PIUZE: I believe the judge in Minnesota was
24 more to your liking, your Honor. I think there's very
25 little fluff and we are ten lines away from hard meat.
26 THE COURT: Good. Then let's go to the hard
27 meat and eliminate the ten lines.
28 MR. PIUZE: If I could, your Honor, because of

2006
1 what The Tobacco Institute is, I believe these ten lines
2 are significant to the testimony.
3 THE COURT: Go ahead.
4 MR. PIUZE: Okay.
5 THE COURT: You can begin, so that we both are
6 on the same page, with page 2693, line 11.
7 MR. PIUZE: Okay.
8 (Reading of the testimony of Walker Merryman resumed.)
9 Q. Now sir, you are presently the
10 vice-president, director of communications for The
11 Tobacco Institute?
12 A. Yes, that's right.
13 Q. How long have you held that specific
14 position?
15 A. Since approximately 1981 or '82.
16 Q. When you assumed employment with The
17 Tobacco Institute in 1967, what position did you hold?
18 A. The position title was assistant to the
19 president.
20 Q. And who was the president at that time?
21 A. Horace Kornegay.
22 Q. And how long had Mr. Kornegay been
23 president as of 1976?

24 A. I believe Mr. Kornegay became president of
25 the Institute in 1971.

26 Q. How long did he remain as president after
27 you started with The Tobacco Institute in 1976?

28 A. Mr. Kornegay retired in the mid-1980s. I

2007

1 don't recall the date.

2 Q. And his successor was whom, sir?

3 A. Samuel Chilcote.

4 Q. And how long did Mr. Chilcote hold the
5 position as president of The Tobacco Institute?

6 A. Mr. Chilcote remains in that position
7 today.

8 Q. Have you served as an assistant to him in
9 addition to your job as vice-president, director of
10 communications?

11 A. No. My position is vice-president and
12 director of communications.

13 Q. Can you describe for the ladies and
14 gentlemen of the jury and the court your general duties
15 as vice-president, director of communications for The
16 Tobacco Institute?

17 A. Generally speaking, I'm responsible to --
18 for responding to inquiries from the news media. If we
19 get a call from a reporter, it's my job to try to
20 respond to that reporter if I can, if I have the
21 information, and if it's something that we can respond
22 to.

23 Q. Do you respond to issues regarding smoking
24 and health?

25 A. On occasion. If the reporter asks, we do,
26 yes, sir.

27 Q. And do you specifically respond to
28 inquiries?

2008

1 A. Certainly not all of them. We might not
2 have the information. But on occasion we have, yes,
3 sir.

4 Q. And I'm asking now just about you. Let's
5 put The Tobacco Institute aside for a minute,
6 Mr. Merryman.

7 Have you yourself responded to specific
8 inquiries regarding smoking and health, inquiries
9 directed to The Tobacco Institute by the media?

10 A. I myself have responded to questions from
11 reporters about smoking-and-health issues, yes, sir.

12 Q. And would it be fair to state that from
13 the time you started in 1971, right up to today, you
14 have never admitted, as the spokesman for The Tobacco
15 Institute, that smoking causes lung cancer?

16 A. I began with the Institute in 1976, rather
17 than '71 as you stated.

18 Q. Excuse me, 1976.

19 A. It's quite true that the position of the
20 Institute, that I have articulated is that we don't
21 believe it's before been established that smoking is a
22 cause of disease.

23 Q. So that it would be fair to state that,
24 not only with regard to lung cancer, with regard to any
25 disease, you on behalf of The Tobacco Institute have
26 never stated that smoking causes any disease; is that
27 correct?

28 A. I have never stated that we believe it's

1 been proven that smoking causes disease, yes, sir.

2 Q. Now, during the course of your career from
3 1976 up to the present time in working for The Tobacco
4 Institute, have you had an understanding with regard to
5 who funds The Tobacco Institute?

6 A. Yes, sir, it's very clear who funds the
7 Institute. The member companies, the companies that
8 manufacture tobacco products.

9 Q. Okay. So Philip Morris funds it?

10 A. Philip Morris is one of our members, yes,
11 sir.

12 Q. RJR funds The Tobacco Institute?

13 A. R.J. Reynolds, yes sir, they are a member
14 as well.

15 Q. Brown & Williamson?

16 A. Yes, sir.

17 Q. American?

18 A. No, sir, American is not a separate
19 company.

20 Q. Was American a member of the institute
21 before it was purchased by Brown & Williamson?

22 A. From time to time it was, yes, sir.

23 Q. Lorillard --

24 A. Yes.

25 Q. -- funds the Institute?

26 A. Yes, sir. Lorillard is one of our
27 members.

28 Q. And Liggett was a membership -- a member,

1 excuse me, of the Institute?

2 A. They have been in the past. They are not
3 presently.

4 MR. GOLDSTEIN: The next designation is on page
5 2704 on line 6.

6 (Reading of the testimony of Walker Merryman resumed.)

7 Q. Now, have you ever asked any of the member
8 companies that you work for whether or not they consider
9 smoking to be addictive?

10 A. Well, the guidance we received from our
11 member companies certainly would indicate that they
12 don't believe that with respect to using the word
13 "addiction" and smoking, that that's proper. I don't
14 think it's proper. I know a lot of people do, but I
15 don't think it's proper to say that smoking a cigarette
16 is the same thing as using heroin or crack.

17 Q. The Surgeon General said that in 1988;
18 correct?

19 A. He equated -- as I recall, the Surgeon
20 General equated smoking a cigarette with using heroin
21 and crack.

22 Q. Thank you.

23 Now my question to you is this: Have you
24 asked any of the scientists at any of the member
25 companies of The Tobacco Institute whether they consider
26 smoking addictive?

27 A. No, sir. I don't have regular contact,
28 really any contact to speak of with scientists at the

1 company. My contact would come at another level.

2 Q. Your contact comes through the lawyers;
3 correct?

4 A. No, my contact comes from people in the

5 public relations area of the companies.
6 Q. Are the people in the public relations
7 areas of the companies learned in the medical sciences?
8 A. Well, I would ask them for information,
9 which they would get from other people at the
10 companies. I'm sure that that's the way it would work,
11 sir.
12 Q. Well, you're the one that does it, not
13 me. So you say you're sure that's the way it would
14 work.
15 Let me ask my question again. Okay?
16 Do you know if any of the PR people you talk with are
17 learned in the medical sciences? "Yes" or "no."
18 A. I guess it depends on what you mean by
19 "learned in the medical sciences."
20 Q. Are they Ph.D.s?
21 A. I don't know.
22 Q. Are they medical doctors?
23 A. I don't know of anyone in the public
24 relations field who's a medical doctor, no, sir.
25 Q. Are they are psychologists or
26 psychiatrists?
27 A. I don't know.
28 Q. So you wouldn't know if they were learned

2012

1 in the medical sciences; is that right?
2 A. If that's what you mean by "learned in the
3 medical sciences," then I would not, no, sir.
4 Q. So as I understand it, PR people from the
5 companies give you information; is that right?
6 A. I would ask my colleagues at my member
7 companies for information on subjects, and they would
8 report back to me on what they found.
9 Q. Did you ask them who they got the
10 information from?
11 A. I cannot sit here and tell you I can think
12 of a specific instance where that occurred, no, sir.
13 Q. Did you ask them for any written materials
14 analyzing issues of smoking and health?
15 A. We have received material on smoking and
16 health over the years. Not recently. It's been an
17 awfully long time since we've received anything on the
18 smoking-and-health issue. And we certainly have issued
19 materials from The Tobacco Institute that is responsive
20 to smoking-and-health questions, but as I said, it's
21 been an awfully long time since we've gotten into that.
22 Q. You are still responding to
23 smoking-and-health inquiries; are you not, sir?
24 A. We do when they come up, but very, very
25 infrequently are we asked about that subject now, sir.
26 Q. And even today when you're asked about it,
27 you state that smoking doesn't cause any diseases;
28 correct?

2013

1 A. No, sir. We say that we don't believe
2 it's been established or proven that smoking causes
3 disease. We know that smoking is statistically
4 associated with disease, but we know that -- we also
5 believe that it's not been established that something
6 causes disease. And we believe we have support for
7 that, that view, in the scientific literature.
8 Q. You say that --
9 You say there's a statistical association;

10 is that right?
11 A. Yes, sir.
12 Q. Now, do you know or have you spoken to
13 anyone in the medical field as to when a statistical
14 association becomes cause and effect?
15 A. Well, I think there are some things that
16 people in medicine and science have suggested they would
17 like to see before they can judge a cause-and-effect
18 relationship exists. For example, they would like to
19 know the basic mechanism for the causation of the
20 disease; in the case of cancer, why a previously healthy
21 cell sometimes becomes malignant.
22 Q. What else would they like to see, sir? A
23 mechanism. What else?
24 A. Well, I think that's the -- one of the
25 demonstrations. Perhaps one of the basic questions that
26 scientists have had over the years about whether smoking
27 causes disease; that is, no one's ever been able to
28 describe the mechanism.

2014

1 Q. Sir, what else do doctors look to do --
2 excuse me.
3 Sir, what else do doctors look to to
4 determine cause and association from statistical -- or
5 cause and effect from statistical association?
6 If you know. If you don't, just tell me
7 you don't know.
8 A. My only experience is with smoking and
9 health, and beyond that I wouldn't know, sir.
10 Q. Do you know if they look at the
11 consistency of the association?
12 A. I know that that's one thing that some
13 people have noted as they believe in their judgment's
14 important.
15 Q. Do you know if they look to the strength
16 of that association?
17 A. Again, I believe that's one thing that
18 some people who have studied this look at and believe is
19 important.
20 Q. Do you know if they look to the
21 specific -- specificity of the association?
22 A. That I believe is also something that they
23 look to and might believe important.
24 Q. Do you know if they look to the temporal
25 relationship of the association?
26 A. I believe so, yes, sir.
27 Q. Do you know if they look at the coherence
28 of the association?

2015

1 A. I believe so, yes, sir.
2 Q. And what do you understand the coherence
3 of the association to be, sir?
4 A. I don't know that I understand that
5 scientific term very well, sir.
6 Q. Do you understand what the temporal
7 relationship of the association is?
8 A. I have heard that phrase, but I've never
9 heard it described.
10 Q. So you don't know what it is; do you?
11 A. I've not heard it described.
12 Q. Do you know what the specificity of the
13 association is?
14 A. Again, that's a scientific term that I'm

15 not familiar with. I've heard it described, but I've --
16 I've heard it said. I have not heard it described.
17 Q. Do you know what "the strength of the
18 association" means?
19 A. No, sir.
20 Q. Do you know what "the consistency of the
21 association" means?
22 A. No, sir.
23 Q. So you really don't know any of the
24 criteria that the medical world uses in defining cause
25 and effect; do you, sir?
26 A. I don't know if what you've described
27 could fairly be said to be the medical world's view of
28 how statistics can be translated into a cause-and-effect

2016

1 relationship.
2 MR. GOLDSTEIN: The next will be at page 2712 at
3 line 18, please.
4 THE COURT: Thank you.
5 (Reading of the testimony of Walker Merryman resumed.)
6 Q. Okay. You do feel, do you not, that
7 people have the right to the whole truth about smoking?
8 MR. LEITER: Objection.
9 MR. BLEAKLEY: Objection, your Honor.
10 THE COURT: Hold on.
11 (A pause in the proceedings.)
12 THE COURT: Objection is overruled. You may
13 answer.
14 (Reading of the testimony of Walker Merryman resumed.)
15 A. Certainly.
16 Q. In fact, you believe it's important for
17 the American people to have the right to the whole truth
18 about smoking; don't you?
19 MR. BLEAKLEY: Objection. May I have a
20 continuing objection to this line of questioning on this
21 and the next two pages?
22 THE COURT: Yes, you may, and the same ruling
23 will flow.
24 Go ahead.
25 (Reading of the testimony of Walker Merryman resumed.)
26 A. I believe that people ought to have as
27 much information as they can get, yes, sir.
28 Q. Well, my question was a little different.

2017

1 You believe it's important for the
2 American people to have the right to the whole truth
3 about smoking; correct?
4 A. Yes, sir.
5 Q. Now, would you agree, sir, that a
6 manufacturer who is making a product has more
7 information about that product than anyone else in the
8 world?
9 A. As a general proposition, I imagine that's
10 probably true.
11 Q. And you would agree that manufacturers,
12 and specifically the tobacco industry, has a duty to the
13 American people to research its product; wouldn't you?
14 A. I'm sorry, sir, did you say the Institute
15 or the industry?
16 Q. The industry.
17 A. The industry has a duty to research its
18 product?
19 Q. Yes.

20 A. Yes, sir.
21 Q. To find out what its risks are; correct?
22 A. If you're asking me a legal question, I --
23 I don't know, I'm not a lawyer.
24 Q. That's not what I asked you.
25 Do you feel the companies have a duty to
26 find out what the risks of their products are?
27 A. I personally?
28 Q. Yes.

2018

1 A. Yes, sure. I think that's -- that's
2 something that any company would probably be interested
3 in.
4 Q. And would you agree, sir, in your position
5 as vice-president of communications, that the cigarette
6 companies have a duty to research the risks of their
7 product?
8 A. No, I don't know that I know what their
9 duty is. But I think that the risks of -- of smoking
10 are pretty well understood by people.
11 MR. GOLDSTEIN: At page 2714, at line 25, the
12 last two words.
13 THE COURT: Wait. 2714?
14 MR. GOLDSTEIN: Yes. At the bottom of this
15 page, your Honor, the last two words.
16 THE COURT: Wait.
17 (A pause in the proceedings.)
18 THE COURT: 2714?
19 MR. GOLDSTEIN: Yes.
20 THE COURT: To what line?
21 MR. GOLDSTEIN: Line 25, and there are two words
22 that begin a sentence.
23 THE COURT: Okay. That's a question. Go
24 ahead.
25 MR. PIUZE: I flunked. Just say it one more
26 time so I don't mess it up, please.
27 THE COURT: Line 25, the last two words
28 beginning with "I'm just."

2019

1 MR. PIUZE: Okay. Thank you.
2 (Reading of the testimony of Walker Merryman resumed.)
3 Q. I'm just wondering whether you feel that
4 manufacturers, specifically the cigarette industry, has
5 a duty to look into research to find out what the risks
6 of its products are. It's a simple question.
7 A. I think that if a company becomes aware
8 that there's something about its product that
9 possibly -- that's possibly risky, then they've got --
10 then they should look at it and -- and then research,
11 certainly.
12 Q. And they should tell the consumers about
13 it, right?
14 A. Oh, if there's something consumers don't
15 know, there's some breakthrough or something about the
16 product the consumers aren't aware of, I think it's
17 probably a good idea for the company to let people know
18 about it.
19 Q. How would you know whether all the
20 consumers knew or didn't know unless you told them?
21 A. I don't think it's possible for any
22 company to know what all consumers know, but I think
23 it's certainly possible for companies to have a good
24 understanding of what it's customers know and understand

25 and believe about its product.
26 Q. But you would agree it's reasonable that a
27 company should do whatever they can do to get
28 information out so the consumers do know what the

2020

1 company knows about its product; correct?

2 A. Well, as a general proposition, I think
3 most companies would be interested in having consumers
4 know about their products, yes, sir.

5 Q. Specifically about health risks, sir, or
6 whether they think it causes something, should the
7 cigarette companies, through you, The Tobacco Institute,
8 tell the American people what they know?

9 A. I think if they become convinced of
10 something, then they would certainly let us know what
11 their position was, and we could then tell the public on
12 behalf of the industry what that particular perspective
13 was.

14 Q. So if they became convinced. And what
15 type of convincing would be necessary, in your judgment,
16 before the cigarette industry should tell the public
17 what the risks of the product are?

18 A. I don't think that's a question I could
19 answer. I just don't know, sir.

20 Q. Have you ever asked that question?

21 A. No, sir.

22 Q. In your communications you have -- and I
23 don't mean this in an impertinent way, but you have
24 literally flooded the media with statements on behalf of
25 the industry; have you not?

26 A. Well, I think I certainly would quarrel
27 with your use of the word "flooded." We have made the
28 news media aware of the fact that we exist as an

2021

1 information resource. Then, of course, it's up to the
2 news media to decide whether or not they even want to
3 call us to get our perspective, and then make a decision
4 on how much of the information we give them they think
5 is useful that they can disseminate.

6 Q. Well, you've appeared on Ted Koppel.

7 A. Yes, sir.

8 Q. You've a period on McNeil-Lehrer?

9 A. Yes, sir.

10 Q. You've appeared on the NBC Nightly News?

11 A. I believe I have, yes, sir.

12 Q. You've appeared on the CBS Evening News?

13 A. Yes.

14 Q. You've appeared on the ABC Evening News?

15 A. I have.

16 Q. You've appeared on CNN Evening News?

17 A. Yes, I've appeared on CNN.

18 Q. You've appeared on Good Morning America?

19 A. I can't recall if I personally have, sir.

20 Q. The Tobacco Institute has.

21 A. Someone from the Institute has, yes.

22 Q. You've appeared on CBS morning shows?

23 A. Yes.

24 Q. You've appeared on the Public Broadcasting
25 Corporation?

26 A. Yes, sir.

27 Q. You've appeared on radio and TV in every
28 state in the union; haven't you, sir?

2022

1 A. That's correct.
2 Q. You have appeared here in Minnesota;
3 haven't you?
4 A. Yes, sir.
5 MR. PIUZE: Now we are at 2719, line 2.
6 THE COURT: Give me a moment.
7 (A pause in the proceedings.)
8 THE COURT: Go ahead.
9 (Reading of the testimony of Walker Merryman resumed.)
10 Q. And on all those shows that you have been
11 on you have conveyed the industry's message with regard
12 to smoking and health, haven't you?
13 A. No, sir, I wouldn't say that -- I wouldn't
14 say that's at all true, because in many cases the
15 reporter isn't interested in smoking and health; and
16 part of the reason we are there is to try to respond to
17 their questions, and their questions come from what they
18 understand to be the community's concern about a
19 particular issue. I can't direct that.
20 Q. Well, are you saying that when you've
21 appeared on all these shows, the questions did not
22 involve smoking and health?
23 A. Well, I believe your question said
24 something like all of my appearances involved smoking
25 and health. My only -- my only intent was to try to let
26 you and the jury know that that's not necessarily the
27 case, sir.
28 We do respond to questions as they are

2023

1 asked of us, but in not all of those occasions were
2 smoking-and-health issues raised.
3 Q. You've appeared, sir, in all of those
4 programs at one time or another and have discussed,
5 among other things, the issue of smoking and health;
6 have you not?
7 A. We have discussed the issue of smoking and
8 health. I cannot sit here and tell you that in every
9 single one of those appearances you mentioned smoking
10 and health came up as an issue. I don't know that.
11 Q. And you've sent letters to the editor on
12 the issue of smoking and health?
13 A. Yes, sir.
14 Q. You have a newsletter that goes out?
15 A. We do not, no, sir.
16 Q. You did have a newsletter?
17 A. We did at one time have a newsletter. It
18 was privately circulated.
19 Q. And that dealt with smoking and health,
20 among other issues?
21 A. Smoking and health was one of the issues
22 that occasionally was dealt with within the newsletter,
23 yes, sir.
24 MR. PIUZE: Okay. We are at 2721, line 2.
25 THE COURT: Okay. This is probably a good place
26 to take the break since we are moving to another page.
27 I want to not only admonish the jury but also give you
28 another preview.

2024

1 Again, you are not to discuss this case
2 amongst yourselves or with anyone else. Do not form or
3 express any opinion on the matter until it's finally
4 submitted to you.
5 In all likelihood, when we come back at

6 1:30, we are going to interrupt this reading. We will
7 have a live witness. We will put that live witness on
8 and then we will come back to this.

9 Have a pleasant lunch. We will see you
10 when you get back.

11
12 (The following proceedings were held
13 in open court outside the presence
14 of the jury:)

15
16 THE COURT: Okay. I think the jurors have now
17 left. Any other issues that we need to take up in the
18 presence of the reporter?

19 MR. PIUZE: No, sir.

20 THE COURT: Okay.

21
22 (The noon recess was taken until
23 1:30 p.m. of the same day.)
24
25
26
27
28

2025

1 Los Angeles, California August 28, 2002
2 Case Number: BC249171
3 Case Name: Bullock vs. Philip Morris
4 Department 19 Hon. Warren L. Ettinger, Judge
5 Reporter: Ruanne McArthur, CRR, CSR #2699
6 Time: 1:30 p.m. Session
7 Appearances: (As heretofore noted.)
8 -oOo-

9 (The following proceedings were held
10 in open court within the presence of
11 the jury:)

12
13 THE COURT: Counsel, could you come up here for
14 a moment.

15
16 (A discussion was held at the bench,
17 not reported.)

18
19 (The following proceedings were held
20 in open court within the presence of
21 the jury:)

22
23 MR. PIUZE: Dr. Louis Vandermolen is
24 plaintiff's next witness.

25 THE COURT: Doctor, would you step around the
26 side of the witness stand, and would you stop there, and
27 raise you right hand.

28 Do you solemnly state that the testimony

2026

1 you may give in the cause now pending before this court
2 will be the truth, the whole truth, and nothing but the
3 truth so help you God?

4 THE WITNESS: Yes.

5 THE COURT: Would you be seated, sir, and in a
6 loud, clear voice -- first, we are going to slip that
7 microphone on you.

8 Okay. In a loud, clear voice would you
9 state your full name and spell for us both your first
10 and last name.

11 THE WITNESS: Louis Vandermolen, L-o-u-i-s,
12 V-a-n-d-e-r-m-o-l-e-n.

13 THE COURT: This is Dr. Vandermolen?

14 THE WITNESS: Correct.

15 THE COURT: Doctor, as I explain shamefully to
16 all of the witnesses, the acoustics are not very good
17 here, so it's really important that you keep your voice
18 up. Project and speak loudly.

19 Listen to the question that the lawyer
20 asks -- and this is the toughest thing you are going to
21 have to do. Make sure you understand the question
22 before you answer and then answer only what he asks for.
23 If it's a yes or no, just give him a yes or no. He will
24 follow it up by taking you where he wants the evidence
25 to go.

26 Make sure that you are not talking when he
27 is talking, because the court reporter has to take notes
28 and she can't get two voices.

2027

1 When you hear attorneys on the other side
2 say "objection," stop wherever you are. Don't finish
3 the sentence. Just stop dead in your tracks; and then I
4 will hear what the objection is and make a ruling.
5 Okay?

6 THE WITNESS: Yes.

7 THE COURT: Thank you.

8

9 * LOUIS VANDERMOLEN, M.D.,
10 Called by the plaintiff as a witness, was sworn and
11 testified as follows:

12

13 THE COURT: Mr. Piuze, you may begin.

14

15 * DIRECT EXAMINATION

16

17 BY MR. PIUZE:

18 Q. Good afternoon.

19 A. Good afternoon.

20 Q. Tell us your occupation, please.

21 A. Medical oncologist or cancer specialist.

22 Q. Tell us your educational background that
23 allows you to be a cancer specialist, please.

24 A. Undergraduate education, University of
25 California, Riverside, Bachelor's degree in arts;
26 medical degree from Loyola University in Chicago;
27 internship residency at Baylor College of Medicine at
28 Houston, Texas; and fellowship in hematology and blood

2028

1 diseases at Baylor in Houston, Texas; and fellowship in
2 medical oncology at the National Cancer Institute in
3 Bethesda, Maryland.

4 Q. Thank you. Are you a board-certified
5 cancer specialist?

6 A. Yes.

7 Q. For how long?

8 A. Board certified in 1989.

9 Q. What's Bethesda? What's there?

10 A. The National Institutes of Health, of
11 which one of the institutes is the National Cancer
12 Institute; a federal program, federal institution for
13 research of different medical diseases, different
14 medical problems; also associated with Bethesda Naval
15 Hospital, which is part of the Bethesda Medical Plant.

16 Q. Thank you. What is hematology?
17 A. Hematology is a specialty of medicine that
18 pertains to blood disorders, blood diseases, and blood
19 cancers like leukemia.
20 Q. What is oncology?
21 A. Oncology is a specialty of medicine that
22 pertains to cancer and in particular solid tumors like
23 lung cancer, breast cancer, colon cancer.
24 Q. Have you specialized in treating only
25 cancer patients for some period of time?
26 A. Yes.
27 Q. And that period being?
28 A. Since 1990, training in cancer

2029

1 specifically since 1987.
2 Q. Since 1990 have you been practicing only
3 in Orange County?
4 A. I practiced for one year in Memphis,
5 Tennessee, and came to Orange County in 1991.
6 Q. Is your office someplace near Hoag
7 Memorial Hospital?
8 A. My office is in the Hoag Cancer Center,
9 which is part of Hoag Hospital, Newport Beach.
10 Q. For those of us who don't venture down to
11 the Newport Beach area too often, is Hoag a pretty good
12 hospital?
13 A. It's been ranked as one of the best 100
14 hospitals in the United States consistently for the last
15 four or five years.
16 Q. I guess this is a chance for you not to be
17 modest. Is the Hoag Cancer Center a pretty good place?
18 A. I believe it's a pretty good place. It's
19 a good place for treatment of diseases. It wouldn't be
20 at the same level of UCLA or USC as far as research, but
21 as far as care and taking care of patients and treating
22 diseases, I personally think it's one of the best in the
23 country.
24 Q. Over the course of the years, just in
25 round numbers, a ballpark, how many people with cancer
26 have you cared for?
27 A. On the order of 5,000 or more.
28 Q. Over the course of years, again a

2030

1 ballpark, roughly how many of those 5,000 had lung
2 cancer, please?
3 A. Probably somewhere around 30 to 35 percent.
4 Q. If my math is right, we are talking
5 somewhere in the vicinity of 1500 or so lung cancer
6 patients you cared for?
7 A. Yes.
8 Q. What is small cell lung cancer?
9 A. Lung cancer is divided into two different
10 categories. One called small cell lung cancer; the
11 other called non-small cell lung cancer. That
12 distinction is made by the appearance of the cancer
13 under the microscope.
14 Very simply put, small cell lung cancer is
15 a cancer that is comprised of small cells. At one time
16 it was called oat-cell carcinoma because it looked like
17 oats.
18 The other group of non-small cell cancers
19 is comprised of several types that are sort of grouped
20 together: Bronchialveolar, adenocarcinoma, squamous cell

21 carcinoma, large cell carcinoma. Those are all
22 categorized into the non-small cell group.
23 The behavior of small cell is different
24 than the behavior of non-small cell. The treatment of
25 small cell is different from non-small cell; and for
26 that reason the small cell cancers are sort of culled
27 out of the group and put into a separate category.
28 Q. Does Betty Bullock have small cell cancer?

2031

1 A. Yes.
2 Q. Is small cell cancer generally thought to
3 be an inoperable cancer?
4 A. Yes.
5 Q. Why?
6 A. From the onset it's a whole body problem
7 or it's a systemic problem. Again, the behavior of
8 small cells differ from a non-small cell. Non-small
9 cell begins in lung and with time can ultimately spread
10 or metastasize throughout the body.
11 But from the onset, from the very
12 beginning, from the time it's diagnosed, small cell is
13 always a whole body problem; and if you are to operate
14 and take out the tumor in the lung, that would provide
15 benefit only in the lung and would have no effect
16 whatsoever, no impact, on cancer cells throughout the
17 body; and the cancer cells throughout the body would
18 grow and lead to problems in short order.
19 Q. For people with non- -- just as a
20 comparison. For people with non-small cell, not Betty
21 Bullock, but non-small cell, is the thought that
22 if you catch it early enough in the lung and you cut it
23 out right then and there, maybe you can beat it before
24 it escapes out of the lungs and spreads throughout the
25 body?
26 A. Yes.
27 Q. And is the idea with small cell lung
28 cancer, the kind Betty Bullock's got, is that it's

2032

1 already escaped and you can't -- you can't confine it,
2 so don't cut it?
3 A. Right. It's already escaped in the sense
4 the horses are out of the barn and closing the gate
5 won't help.
6 Q. To your knowledge is small cell lung
7 cancer associated exclusively with smoking cigarettes?
8 A. Yes.
9 Q. When did you first see -- let me withdraw
10 that.
11 Did you and I have a phone conversation
12 last night 9:00, 9:30, something like that?
13 A. Yes.
14 Q. Prior to that, had you ever talked to me
15 before?
16 A. No.
17 Q. Did we go through some of the history and
18 some of the milestones of your treatment of Ms. Bullock
19 last night?
20 A. Yes.
21 Q. Were you still in the hospital at that
22 time treating patients?
23 A. Yes.
24 Q. After you left the hospital and treating
25 patients, did you have a chance to go back and take a

26 look at Ms. Bullock's medical chart?
27 A. I looked at part of the medical charts
28 very briefly.

2033

1 Q. I had a feeling at 9:30 going over to the
2 office might not be time for a full review.
3 I'm going to put these up on the witness
4 stand. They are medical records from your office. I am
5 not asking you to look at them. If you feel you want
6 to, you may; but as far I'm concerned, you don't have to
7 open them if you don't want to.
8 When did you first see Ms. Bullock, please?
9 A. I'm glad you gave me these. It was 19 --
10 it was 2001, and I believe it was -- I will look at the
11 charts here. Okay. March of 2001.
12 Q. What were the circumstances, please?
13 A. She had been hospitalized with chest
14 discomfort, chest tightness, and the physician that had
15 hospitalized her felt that she may have had a blood clot
16 in the lung called a pulmonary embolus.
17 She was seen by a lung specialist, who
18 determined it wasn't a blood clot. It was not a
19 pulmonary embolus but, in fact, it was a side effect or
20 a toxicity from a medication; and I was asked to see her
21 to provide a second opinion.
22 Q. Can you tell us roughly how far down the
23 line from her -- we know this here. It's sort of a test
24 for you -- how far down the line from her diagnosis was
25 it when you first saw her in March of 2001?
26 A. Within a couple of weeks.
27 Q. So you saw her where, at Hoag?
28 A. Yeah. She was hospitalized in the

2034

1 hospital, and I saw her in her hospital room.
2 Q. Was the only reason for hospitalization a
3 possible embolus or blood clot?
4 A. Yeah. The reason for hospitalization was
5 evaluation of the chest discomfort and cause of the
6 chest discomfort with a presumptive diagnosis of a blood
7 clot; and yes, it was the chest discomfort that was the
8 cause for hospitalization.
9 Q. Thank you.
10 Had a physician already ruled out the
11 blood clot by the time you got to her?
12 A. Yes.
13 Q. When you assumed her treatment in March,
14 what is it that you did for her, to her, with her while
15 she was still in the hospital, please?
16 A. The treatment that had been started before
17 I assumed her care was a treatment that I was in
18 complete agreement with, and I continued the treatment
19 that had already been started or commenced, which was a
20 combination of chemotherapy and radiation therapy.
21 Q. We have all heard the terms, but I'd
22 appreciate it if you'd tell us. Let's start with chemo.
23 What's chemotherapy and how does it work?
24 And when you are done with that, I am going to ask the
25 same question about radiation therapy.
26 A. Chemotherapy are drugs that kill cancer
27 cells that are administered into the bloodstream. They
28 are injected into the blood; and because they go in the

2035

1 bloodstream, they go everywhere. They go throughout the

2 body. If you put it in the blood, the blood goes
3 everywhere, there is no place in the body that the blood
4 doesn't go.

5 So that's a whole-body treatment. That's
6 a systemic treatment, the whole system. It will go to
7 the chest where the cancer is known to be, where the
8 mass is, but it will also go everywhere else in the body
9 where there might be tiny microscopic floaters or tiny
10 microscopic cells. So that's a whole body treatment and
11 provides treatment locally in the chest but also
12 throughout the body, be it the liver, the lymph glands,
13 the bones.

14 Radiation is X-ray. It's X-ray treatment,
15 and it's a local treatment. It's not a whole-body
16 treatment. It's confined to one area; and the benefits
17 are limited to that area where it's delivered.

18 So if the radiation is given to the chest,
19 that's where the benefits are, right where the radiation
20 is given; but if there happens to be cancer elsewhere,
21 say down here in the liver, taking radiation to the
22 chest isn't going to have any impact here. So it's a
23 local treatment, and the benefits are limited to the
24 site of therapy.

25 Q. What are some of the common downsides or
26 side effects of chemotherapy, please?

27 A. Nausea, vomiting, weakness, fatigue,
28 malaise. Depending upon the drugs that are used, a drop

2036

1 in the blood counts, a drop in the white count, which
2 could increase the risk for infection, a drop in the red
3 blood count which could lead to weakness, fatigue,
4 shortness of breath, hair loss, diarrhea, skin rashes.

5 With certain drugs, what's called
6 neuropathy. This is a sensation of numbness of your
7 fingers and numbness of your toes. It can be problems
8 with kidney function, can be problems with heart
9 function, and problems with mentation or thinking,
10 cognitive function.

11 Q. As time went on -- are you still treating
12 Betty Bullock, by the way?

13 A. Yes. I am still treating her now, yes.

14 Q. As time went on from March of 2001 until
15 August of 2002, has Betty Bullock had any of those side
16 effects?

17 A. Yes.

18 Q. Is there any one of those side effects
19 that Betty Bullock hasn't had?

20 A. She hasn't had any kidney problems or
21 heart problems; but other than that, she's had just
22 about everything that I just listed.

23 Q. What are the downsides or side effects to
24 radiation therapy, please?

25 A. A certain dose of radiation is needed to
26 kill the cancer. What limits the amount of radiation is
27 the normal tissues within the field, the normal tissues.

28 In this case, giving radiation to the

2037

1 chest, the normal tissues are the lung, the skin, the
2 esophagus, which is the tube that connects your mouth to
3 your stomach. All of those things are right there where
4 you are giving the radiation.

5 So those things are also going to get
6 treated with that radiation, in a sense get -- for lack

7 of a better term -- burned by that radiation; and
8 there's a limit to how much radiation those normal
9 organs within the field can take.

10 Some areas of the body you can't treat
11 with radiation because the normal tissues would be
12 damaged irreparably long before the cancer would be
13 damaged; but in the case, a dose can be given that can
14 effectively kill the cancer, cause harm to the local
15 other organs, the other tissues in the area, but in the
16 majority of cases, that damage or that harm is
17 reversible.

18 So what's in the area is the lung; and if
19 the lung gets irritated, it can cause symptoms like
20 pneumonia because it's an inflammation of the lung and
21 pneumonia is an inflammation of the lung. So cough and
22 shortness of breath and fever and pain, like you'd
23 expect with someone who has pneumonia.

24 If you have irritation of the esophagus,
25 you can imagine it to be the worst case of heartburn you
26 have ever had; burning and pain and pain with
27 swallowing. When the food goes down, it feels like
28 there's razor blades right there.

2038

1 Some people lose as much as 20 pounds
2 while taking radiation because they just rather not eat.
3 It hurts too much to eat.

4 The skin, it can cause redness of the skin
5 like the worst sunburn you have ever had. It can be
6 painful, it can itch, it can be ulcerated, it can weep.

7 There can be irritation to the heart,
8 because the heart is in the same area. It can cause
9 weakness of the heart, weakness of the heart muscle.
10 The heart is a pump.

11 There can be damage to the spinal cord
12 which travels right through the back on the other side.
13 The beam travels right through and that can lead to
14 problems with neurologic function, numbness, tingling,
15 even paralysis.

16 So the toxicities are defined by the
17 normal organs within the radiation field; in this case,
18 esophagus, heart, skin, and lung.

19 Q. Did Betty Bullock have any side effects
20 from radiation therapy?

21 A. She developed severe radiation
22 esophagitis, which is a severe inflammation of the
23 esophagus to the point where she needed to be
24 hospitalized due to dehydration and nutritional
25 problems.

26 Q. Now, when you say she needed to be
27 hospitalized, is that on a different time than you have
28 told us about so far when you first told us about her

2039

1 treatment?

2 A. Yes.

3 Q. That's something else later on down the
4 line?

5 A. Correct.

6 Q. Why use, as you have told us you did in
7 this case, both chemo and radiation therapy on one
8 person?

9 A. The bulk of the disease was in the chest.
10 That's where we can see it. That was where the mass
11 was. That's where what we call the macroscopic disease

12 was. The disease elsewhere in body wasn't identifiable
13 on scans so that was microscopic disease.

14 And over the last 20 years, studies have
15 shown that if you use chemotherapy for a whole body
16 management and radiation for a local management, you
17 will get the best outcome.

18 The chemotherapy actually provides three
19 different benefits. It treats the microscopic disease
20 systemically. It does cause shrinkage of the mass
21 itself. It does shrink the tumor itself, but it also
22 acts to get into the cancer cells and make the cancer
23 cells more susceptible to the effects of the radiation.

24 So the chemotherapy kind of gets into the
25 cancer cells so that the radiation is then more
26 efficient at killing the cancer cells.

27 And for that reason, the treatment is
28 given at the same time congruently as opposed to

2040

1 consecutively so you do chemotherapy and later do
2 radiation. It needs to be done at the same time.

3 Q. As doing the two treatments is hopefully
4 more effective if you do them at the same time, are the
5 downsides or the side effects that you mentioned from
6 each of them worse if you do them at the same time?

7 A. Yes. The toxicities and side effects are
8 definitely greater: More chance of esophagitis,
9 irritation of the esophagus; more chance of irritation
10 of the lung has clearly been shown on many trials; more
11 chance of drop in the blood counts; a greater chance of
12 skin problems from radiation.

13 So clearly the toxicities are greater with
14 the using them at the same time, the congruent or
15 combined approach; but at the same token you need to
16 balance that against the fact that numerous studies have
17 shown repetitively that doing the treatment congruently
18 at the same time provides a greater chance of long-term
19 benefit and survival.

20 Q. Thank you.

21 Is lung cancer -- regardless of form;
22 regardless of small cell, large cell -- is lung cancer
23 almost certainly, inevitably a fatal disease?

24 A. The majority of patients with lung cancer
25 will die of their disease.

26 Q. The majority goes all the way from 51 up
27 to 100. Can you be more precise with a percentage,
28 please?

2041

1 A. In small cell lung cancer?

2 Q. No.

3 A. In all cancers?

4 Q. So all lung cancer, please.

5 A. It would depend on the stage. It would
6 depend on the extent of the disease; but I think in
7 general terms, talking about all lung cancer, the chance
8 of cure, small. Maybe all lung cancers grouped
9 together, 25 percent, maybe 30 at best.

10 Q. Thank you. When you say "cure," as I
11 think you just did in your answer, what does "cure"
12 mean?

13 A. Cure means that the cancer goes away, is
14 gone and never comes back again. So cure is that it's
15 gone and never reappears.

16 Q. Thank you. Now I would narrow the

17 question to small cell lung cancer. What are the
18 percentages there, please?
19 A. All small cell?
20 Q. Yes.
21 A. If you take all small cell lung cancers,
22 the cure rates are going to be less than 10 percent,
23 probably on the order of, all grouped together,
24 5 percent at best.
25 Q. Is Ms. Bullock's small cell lung cancer a
26 fatal disease?
27 A. Yes.
28 Q. Does she have a limited life expectancy?

2042

1 A. Yes.
2 Q. What do you believe that life expectancy
3 is, please?
4 A. Today?
5 Q. As of today.
6 A. Several months. At this point I would
7 suspect her life expectancy is less than three months
8 and maybe less than two months.
9 Q. At the time of diagnosis, when someone is
10 diagnosed with small cell lung cancer, does a doctor --
11 well, do you take a look at the patient and say to
12 yourself, "This person probably has no more than
13 X-number of months to live"?
14 A. Yes.
15 Q. Is that something that you necessarily
16 share with the patient?
17 A. Not always in those exact terms. I mean,
18 we might talk about the chance of response, the chance
19 of improvement, the chance of being alive at one year,
20 at three years, at five years.
21 A lot of people aren't quite ready to know
22 just exactly how bad things might be in their near
23 future.
24 Q. Right. Is that something that you take
25 into account in deciding what to share with the patient?
26 A. Yeah. I believe you can hurt people with
27 the truth.
28 Q. What I'd like to do is show you some

2043

1 medical illustrations, maybe not all at once. I haven't
2 decided. I will figure it out as I go along.
3 But these illustrations are of the cancer,
4 both in the chest and -- we haven't established this
5 yet -- and has Ms. Bullock's cancer metastasized or
6 spread to her liver? Yes?
7 A. Yes.
8 Q. So these illustrations are both the chest
9 and the liver; and when I, in a minute or so, when I ask
10 you to take a look at them -- I got the X-rays here if
11 you want to see them again -- and I'd like you to
12 confirm that these are accurate medical representations
13 or illustrations of what the cancer looks like and where
14 it is.
15 THE COURT: Counsel, have these heretofore been
16 marked or identified, or are they all going to come in
17 for the first time today?
18 MR. PIUZE: You are going to be hearing -- the
19 court will be hearing the numbers for the first time
20 today.
21 THE COURT: Thank you. Is there going to be any

22 objection to the receipt in evidence or the showing of
23 these to the jury?

24 MR. BLEAKLEY: No, your Honor.

25 THE COURT: Okay. So if you will just guide us
26 through the numbers and a brief explanation as to what
27 each number represents, that would be helpful.

28 MR. PIUZE: 8358.

2044

1 THE COURT: 8358 is what?

2 MR. PIUZE: Left lung mass, 2-19-01.

3 THE COURT: And it is offered in evidence?

4 MR. PIUZE: It is.

5 THE COURT: And it is received in evidence
6 without objection.

7

8 * (Received in evidence Joint
9 Exhibit number 8358, document.)

10

11 THE COURT: Okay.

12 MR. PIUZE: I am going to tilt this maybe, but I
13 will try to tilt it a little more toward -- well, this
14 is no good for you, your Honor.

15 THE COURT: That's all right. You can just move
16 that easel back just a tad.

17 MR. PIUZE: Easier said than done. What if I
18 put it in here? Will that be okay?

19 THE COURT: Last time you put it on the table,
20 and that's no problem doing that again. I mean
21 theoretically that's no problem.

22 (Laughter.)

23 (A pause in the proceedings.)

24 MR. PIUZE: If nobody sneezes, we will be okay.

25 THE COURT: Mr. Leiter or Mr. Bleakley, if you
26 wish to move so that you can see, feel free to do so
27 without asking. Just pick up and move.

28 MR. LEITER: Thank you, your Honor.

2045

1 MR. PIUZE: Okay.

2 Q. Doctor, I don't know if it will ever be
3 necessary, if it is necessary, here is a pointer and you
4 can step down; but if can you do it from here, that's
5 fine too, and I will use the pointer if you direct me.

6 Is that an accurate medical representation
7 of the left lung mass that Betty Bullock had in February
8 of '01?

9 A. Yeah, I think so.

10 Q. Would you? Now I think I need you. Could
11 you use the pointer and show what it is, what it is
12 interfering with. I'd appreciate it.

13 A. Okay. Just for orientation, this is the
14 body, of course, the neck, shoulder, shoulder. There's
15 a collar bone. There's a collar bone. That's the
16 windpipe right there, the trachea, just for orientation.

17 This is the lung on the right side. This
18 is the lung on the left side. These are the ribs and
19 the ribs; and this down here is the abdomen. That's the
20 diagram. That's the muscle that separates the chest
21 from the abdomen.

22 The windpipe comes down to about here and
23 branches off and gives a branch to the right lung and a
24 branch to the left lung. Here is the heart. The aorta,
25 the blood vessel that comes off the heart, comes up and
26 gives this branch and this branch -- that's the carotids

27 that are going up to the brain. This takes a turn and
28 goes down to the rest of the body.

2046

1 This is the mass here. That's the tumor.
2 It's sort of growing in the center part of the chest;
3 and what's not showing here is there was also some
4 enlarged lymph glands in front of the windpipe back here
5 behind the windpipe; and there's some enlargement of
6 glands next to the windpipe. So a large mass that was
7 growing in here and growing in this way here.

8 This is the rest of the -- the normal
9 lung on the left side.

10 Q. Okay.

11 A. That was the situation.

12 Q. While you are up, let me just jump one
13 series ahead. I might get it slightly out of
14 chronological sync here, but we won't have you jump up
15 and down too much.

16 After about --

17 Your Honor, this is 8359, and it's
18 entitled "Post Radiation and Chemotherapy 6-8-01."

19 THE COURT: Any objection to that being
20 received in evidence?

21 MR. BLEAKLEY: No, your Honor.

22 THE COURT: It is received.

23

24 * (Received in evidence Joint
25 Exhibit number 8359, document.)
26

27 MR. PIUZE: Why don't you leave that there for
28 now. Okay? Just for comparison purposes here.

2047

1 Q. After the chemotherapy and after the
2 radiation therapy, did that left lung mass shrink a lot?

3 A. Right. So when it was measured
4 initially, the widest diameter was 11 centimeters; and
5 what's remaining now is this small mass here that's a
6 little bit more 3, 3.3 centimeters; and that's a
7 substantial decrease in size because it's
8 three-dimensional. It's not just -- it's
9 three-dimensional, so a substantial shrinkage.

10 And the other thing, as I mentioned, some
11 lymph glands in front of the windpipe and next to the
12 windpipe, those are gone. So these lymph glands
13 completely and the mass itself has shrunk from 11 to 3
14 centimeters. This is really three-dimensionally more
15 than a 90 percent shrinkage.

16 The way we do it -- the way we do it is we
17 calculate the bi-perpendicular diameter. That's the way
18 we try to account for the three-dimensional change.

19 So if you take this one, it's 11 times 11,
20 which is -- that is --

21 Q. 121.

22 A. Thank you. Okay.

23 And this one here is roughly three times
24 three. So it's gone from 121 to 9 or almost 10, I
25 guess. So that's why I say it's a 90-percent shrinkage.
26 It's three-dimensional.

27 Q. So having a 90-percent shrinkage, that's
28 good, right?

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1 A. It is good. We would like 100 percent,
2 but it's very good.

3 What's not known now is this mass here --
4 what's not known is if that's cancer, if it's scar, if
5 it's shrunk down and just left a residual scar, or if it
6 could be a combination of both, cancer and scar.

7 Q. You said before the lymph glands weren't
8 there or something like that. Where did they go?

9 A. They have -- the cancer in the lymph gland
10 has died; and when the cells die, they sort of break
11 apart and get eliminated from the body. So that's --
12 they are gone away. It's in a sense, evaporated.

13 Q. So the cancer is gone, is the lymph gland
14 still there or not? Is that gone too?

15 A. There are lymph glands there that are
16 normal.

17 Q. Okay.

18 A. But there is no cancer in those lymph
19 glands.

20 Q. One more now. 8360, same date -- excuse
21 me. Not true. 8-6-01, and this is called Hepatic --

22 THE COURT: Spell that for us.

23 MR. PIUZE: Sure. H-e-p-a-t-i-c.

24 -- Metastatic Disease.

25 THE COURT: Is there any objection to that
26 document or that illustration being received in
27 evidence?

28 MR. BLEAKLEY: No.

2049

1 THE COURT: It is received.

2
3 * (Received in evidence Joint
4 Exhibit number 8360, document.)

5
6 BY MR. PIUZE:

7 Q. What does "hepatic" mean, please?

8 A. "Hepatic" means liver.

9 Q. Hepatic metastatic disease means what,
10 please?

11 A. "Metastatic" means spread. So what this
12 is saying is liver spread.

13 Q. All right. I'm going to put it up on the
14 easel here.

15 Is there cancer in Betty Bullock's liver
16 as of August '01?

17 A. Yes.

18 Q. Can you show us, please.

19 A. I just -- I can. For orientation, that's
20 the diaphragm. It separates the chest up here from the
21 abdomen. So now we are -- earlier we were looking up
22 here in the chest.

23 Now we are looking down here in the
24 abdomen. Bellybutton is right about right there; and
25 this is the liver, here on the right upper part of the
26 abdomen. This is the stomach.

27 So the esophagus comes down and ties into
28 the stomach here, and these two deposits here in the

2050

1 liver are deposits of cancer in the liver.

2 Q. Is the liver a common place for lung
3 cancer to spread to?

4 A. Yes.

5 Q. Okay. You can take your seat again. I
6 appreciate your getting up.

7 At anytime during her treatment, did

8 Ms. Bullock ever have breast cancer?
9 A. No.
10 Q. Are you aware that there is at least one
11 or maybe two places in the records that mention breast
12 cancer?
13 A. Yes.
14 Q. Is that just some sort of a clerical or
15 typographical error where something got into her chart
16 that doesn't really belong there?
17 A. Yes. Where that is, if a clerk puts in a
18 requisition for an X-ray in the computer, she has to put
19 a reason. There has to be a reason for that or it won't
20 go through; and sometimes they enter and enter it
21 correctly, but sometimes they enter what they think it
22 is or what it might be, and they will just put breast
23 cancer or lung cancer or whatever.
24 But all of the people that look at the
25 information, all of the doctors involved, the nurses
26 involved, know who entered that information, know why
27 it's there; and if it's not consistent, if it doesn't
28 make sense, nobody really pays attention to it.

2051

1 It's really just a clerical error; and I
2 think there's one place in her chart or maybe two places
3 where on an X-ray report, it may say "Reason for X-ray;
4 breast cancer," but no one involved in her care, nobody,
5 be it the doctors, nurses, nobody who is taking care of
6 her believes that she has breast cancer.
7 Q. So sometimes there can be errors, clerical
8 errors, in medical records?
9 A. Absolutely.
10 Q. If, during the course of this case, anyone
11 sees a reference to breast cancer, that's a straight-out
12 clerical error, Ms. Bullock has never had breast cancer?
13 A. Yes. That's a straight-out clerical
14 error. She has never had breast cancer.
15 Q. Thanks.
16 Here's where I took you away from, I
17 believe: Ms. Bullock was in the hospital. You took
18 over her care, you liked the care that she was getting.
19 It's a combination of chemo and radiation therapy, and
20 you asked it be continued.
21 Do you remember all that?
22 A. Yes.
23 Q. Okay. Did you discharge her from the
24 hospital back in March of '01?
25 A. Yes.
26 Q. And did you tell her to come back and see
27 you for some kind of further treatment, evaluation,
28 et cetera?

2052

1 A. Yes.
2 Q. What was the reason, please?
3 A. She had received chemotherapy, her blood
4 counts were dropping, the white count, the red count was
5 dropping. Her blood counts would need to be monitored
6 if they continued to drop. Certain medications would
7 need to be administered to ensure that they didn't drop
8 dangerously low, possibly even transfusions. So she
9 needed to have blood counts monitored for that reason.
10 Q. Okay. And is that something that you are
11 doing to this day?
12 A. Yes.

13 Q. Monitoring her blood count?
14 A. Yes.
15 Q. If the blood counts get out of whack, does
16 that have an effect on the types of treatment or therapy
17 you can give to her?
18 A. Yes. If the white count gets low and
19 doesn't recover, that limits what you can do because all
20 the chemotherapy drugs cause a decline in the white
21 count, cause a decrease in the white count; and if it's
22 low, then you can't begin treatment because you don't
23 have an adequate white blood count to start treatment.
24 The same is true with the platelet count.
25 White cells fight infection. Platelets help the blood
26 to clot. If the platelet count is too low, you're
27 at risk for bleeding and bleeding can be
28 life-threatening.

2053

1 So if the platelet count is too low, which
2 is one of the blood counts, that can also limit the
3 ability to give treatment or delay treatment or cause
4 problems with having to reduce doses or reduce the
5 intensity of the treatment.
6 Q. In the late winter and early spring 2001,
7 did any of the blood counts come up in such a way that
8 it affected Ms. Bullock's treatment?
9 A. Late winter of 2001?
10 Q. You know what, let me ask it differently.
11 You took over in March?
12 A. Of 2001.
13 Q. Between March and June, one of the
14 pictures we saw was from June.
15 A. Right.
16 Q. Were her blood counts okay, or did --
17 A. During that period of time, her blood
18 counts were low on multiple occasions.
19 Q. What do you do about that?
20 A. If the red count goes down, we often use
21 injections of something called Procrit. It's advertised
22 on TV. If the white count goes down, injections of
23 something called Neupogen can be used or another drug
24 called Lukine is sometimes used.
25 If the white count is low and remains low,
26 there is a risk of infection and patients can get
27 infections. If the red count is low and remains low and
28 doesn't respond, doesn't improve with Procrit, you may

2054

1 need transfusions of red blood cells. If the platelets
2 are low to a dangerous level, you need transfusions of
3 platelets.
4 Q. Has Ms. Bullock over the course of time
5 had -- you described in terms of easy, hard,
6 intermediate course during her treatment?
7 A. I would say that her course has been
8 difficult and fraught with more problems along the way
9 than the average or typical patient.
10 Q. Your reasons for saying that, please?
11 A. She has had severe radiation and
12 esophagitis, irritation of the esophagus that we have
13 already talked about. She has had difficulty with a
14 blood clot in one of the big veins under the collar bone
15 which has required that she be on blood thinners.
16 That creates an increased risk for bleeding. It
17 requires more monitoring.

18 She has had problems with neuropathy
19 somewhat more severe than usual and numbness and
20 tingling of the hands and feet. She's had lower blood
21 counts than usual needing more injections to support her
22 blood counts. She has needed transfusions. Some
23 patients can go through treatment without any need for
24 transfusions.

25 She has had difficulty with thinking, with
26 mentation, more so than the typical patient. It's not a
27 medical term, but patients will call that chemo-brain.
28 They just sense they are just not quite as sharp as they

2055

1 were before they started chemotherapy.

2 Q. That's a pretty long list.

3 Now, do you know how many times
4 Ms. Bullock has been hospitalized since March?

5 A. No. Several. Three, four perhaps.

6 Q. Okay. Do you know how long the
7 hospitalizations have been since March?

8 A. No, not off the top of my head. Several.
9 I know the hospitalization for esophagitis was for a
10 week, maybe ten days.

11 Q. You don't have to look it up. We can look
12 it up later if we want.

13 Do you know, though, that she's been a
14 trooper?

15 A. Yes.

16 Q. Explain why.

17 A. She is not a complainer. She is not a
18 whiner. She accepts things. I have had to give her bad
19 information on more than one occasion. The day we got
20 that scan, it was not an easy task to have to say,
21 "Things in the chest are good, things in the chest look
22 fine, but now we have a new problem, it's in the liver,"
23 and that wasn't there just two months ago when that
24 previous scan was done that showed the 3.3 centimeter
25 mass.

26 And there's been a waxing and waning
27 course since then. We have given her treatment. Things
28 have gotten better. Then we have reassessed, things

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1 have worsened; and since March of 2001 when we began her
2 treatment, she has really been on treatment consistently
3 since then. She has really never had a window, a
4 break. She's never been off treatment; and despite all
5 that, she's a -- good word for it -- she's just been a
6 trooper. She just stays with it.

7 Q. Do most patients get a window or a break?

8 A. Yes. By far and away, the majority of
9 patients would have a period of time, six months, a
10 year, perhaps even longer, where they were free of
11 disease and could enjoy a normal lifestyle.

12 Q. Why hasn't she had a window?

13 A. This scan that was done on August 6 was
14 done when her initial treatment plan was completed, six
15 cycles of chemotherapy and radiation; but this scan
16 showed that the cancer in the chest was gone but now
17 there was cancer in the liver.

18 That would have been the time when she
19 might have been able to be off treatment, but with new
20 cancer developing in the liver, she needed to continue
21 treatment; and since that time, her scans have shown
22 improvement, they have shown worsening, but she has

23 never been free of cancer.

24 Q. Has Ms. Bullock already gone on longer
25 than you thought she would?

26 A. Absolutely.

27 Q. Here is 8452. The date is 7-24-02. The
28 title is "Post-radiation and Chemotherapy."

2057

1 THE COURT: Could I have that number one more
2 time?

3 MR. PIUZE: 8452.

4 THE COURT: I'm sorry?

5 MR. PIUZE: 8452.

6 THE COURT: Thank you. And that is being
7 offered in evidence without objection. Any objection to
8 that?

9 MR. BLEAKLEY: No, your Honor.

10 THE COURT: All right. It is received.

11

12 * (Received in evidence Joint
13 Exhibit number 8452 document.)
14

15 THE COURT: Thank you.

16 BY MR. PIUZE:

17 Q. So this is less than a month ago?

18 A. Correct. I think less than a month ago.

19 Q. Has her liver cancer gotten worse?

20 A. Yeah. This is from just recently,
21 July 24, last month. Between this one and the previous
22 one that we looked at, there was a scan; and those spots
23 in the liver on the previous scan had gone away.

24 So they went away with chemotherapy, and
25 that was sometime in the early part of 2002, maybe
26 January of 2002.

27 (A pause in the proceedings.)

28 A. So those spots that you see now in the

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1 liver, those two white spots in the liver, those are
2 new. They are not the same spots that were there
3 before. They are in different areas, and they are not
4 the same deposits that were there.

5 Those two deposits there before are gone
6 away, and these are two deposits of cancer that are new;
7 and as time goes on, the cancer becomes more resistant.
8 The survival of the fittest, so to speak, but sort of
9 like weeds in the garden. After a while you have to
10 change to a new weed killer because they get resistance.

11 So these are two new deposits of cancer in
12 the liver, and the cancer is now becoming angry. It's
13 becoming resistant and much, much more aggressive.

14 Q. What about up in the lung?

15 A. In the chest some fluid has developed
16 around the heart. It says there, "Pericardial Fusion."
17 What that means is fluid accumulating around the heart,
18 and that's a sign that there's cancer cells.

19 The heart sits in a sac, in a membrane;
20 and that's a sign that there's likely cancer cells in
21 the side of the membrane and irritating the membrane
22 causing fluid to accumulate. Kind of like if you've got
23 an inflamed joint, the joint will swell from
24 inflammation.

25 Q. Okay. Have you explained everything that
26 is pertinent on this exhibit now?

27 A. There's a little bit of fluid in the left

28 chest, a little bit of fluid in the left lung cavity

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1 which could also be related to cancer for the same
2 reason. There may be cancer cells deposited in the left
3 chest cavity.

4 Q. Does it hurt?

5 A. Yeah. The fluid causes an inflammation of
6 the lining of the lung. So it's inflamed, kind of like
7 it's sunburned. So when the lung -- when you take a
8 breath, if this is the lining of the chest cavity, the
9 lung sits here like a balloon. Take a breath, the
10 balloon fills and touches and that's the pleurisy. That
11 sharp pain is what -- you don't really want to take a
12 deep breath because it hurts or if you cough it hurts.

13 Q. Has all the treatment that Ms. Bullock has
14 received been necessary to deal with, stop, slow down,
15 cure, to the best of your ability, her small cell lung
16 cancer?

17 A. Yes.

18 Q. Did I ask you last night to think about
19 whether or not \$321,000 seemed like a reasonable amount
20 of billing for the treatment she has had?

21 A. We talked about that last night; and
22 considering all the treatment that she has, between
23 radiation, chemotherapy, diagnostic scans, medications,
24 hospitalizations, I thought that was within line and
25 reasonable.

26 Q. As part of your treatment of Ms. Bullock's
27 lung cancer, did you have anything to say to her about
28 smoking?

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1 A. Yes.

2 Q. What?

3 A. To quit smoking, stop smoking.

4 Q. What happened, do you know?

5 A. She stopped.

6 Q. Do you know how long she stopped for?

7 A. Not exactly. I know she stopped for a
8 considerable period of time, maybe as much as almost a
9 year, eight, nine months.

10 Q. Do you know why she started again?

11 A. My understanding is she started smoking
12 because the tumor had metastasized or spread. And
13 that's common. I mean, patient's feelings are "I'm
14 going to die anyway, why suffer?"

15 Q. Why suffer?

16 A. Stopping smoking. It's addictive. It's
17 not easy to stop. It's, I think, very difficult; and in
18 some ways I think it's -- if you are addicted to
19 cigarettes and you have to stop, it's a form of
20 suffering.

21 MR. PIUZE: Okay. That's a good place for me to
22 say no further questions. Thank you very much.

23 THE COURT: And it is a good place for me to say
24 we will take our afternoon recess.

25 Do not discuss the case amongst
26 yourselves or with anyone else. Do not form or express
27 any opinion on the matter until it's finally submitted
28 to you.

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1 Fifteen minutes. I have a little business
2 to deal with, with the lawyers, so it may be a shade
3 more than that.

(The following proceedings were held
in open court outside the presence
of the jury:)

THE COURT: I think the record will reflect the
jurors have left the courtroom.

I have a couple of short issues just to
ask about. A guesstimate as to the length of time of
this witness on cross-examination? We are trying to
give you some clue, Doctor, of when you can fight the
traffic.

THE WITNESS: I appreciate that.

MR. BLEAKLEY: Somewhere between a half hour and
45 minutes.

THE COURT: Okay. You may wait outside.

THE WITNESS: Thank you.

THE COURT: Next area. Am I correct in assuming
that after this witness has finished, the next order of
business, which will probably be tomorrow morning, will
be the reading of the transcript?

MR. PIUZE: Not as phrased. If the next order
of business is tomorrow morning, it will be Dr. Farone.

THE COURT: Okay. Okay. So it's going to be
a -- it may not be today that we read any more

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transcript?

MR. PIUZE: That will be your -- if I'm hearing
the estimates right, that's going to be strictly your
decision.

THE COURT: Well, here's the issue. The issue
is, do we want to cut the remainder of the transcript
into bits and pieces, or would you rather reserve it,
assuming we finish at a fairly reasonable hour, you
know, like a quarter of 4:00 or something, and break a
little early so that you won't have it chopped up? And
that's pretty much your call.

MR. PIUZE: May I confer here for a second?

THE COURT: Yes, you may.

(A pause in the proceedings.)

THE COURT: I am not troubled with the idea of
going as long as we can.

(A pause in the proceedings.)

MR. PIUZE: I am in no huge hurry to get the
thing read today, your Honor.

THE COURT: Okay. You should also know,
Mr. Bleakley, I have revisited Section 1292 of the
Evidence Code, which essentially deals with civil
trials; and I am now persuaded that Mr. Leiter's
recollection is correct; and 1292 says that evidence of
former testimony is not made inadmissible by the hearsay
rule if the declarant is unavailable as a witness, and
that is certainly the case apparently here.

Two, that the former testimony is offered

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in the civil trial, and that's this.

And three, that the issue is such that the
party to the action or proceeding in which the former
testimony was given had the right and the opportunity to
cross-examine the declarant with an interest and a
motive similar to that which the party against whom the
testimony is offered has at the hearing.

And finally (b), the admissibility of

9 former testimony under this section is subject to the
10 same limitations and objections as though the declarant
11 were testifying at the hearing, except that the former
12 testimony offered under this section is not subject to
13 objections based upon competency or privilege which did
14 not exist at the time the former testimony was given.

15 The citation that was given, incidentally,
16 was People versus Chavez, and it's 4 Cal.App.3d 832.
17 That does deal with a criminal case, and it deals with a
18 right of confrontation and the fact that a defendant
19 cannot complain about the testimony read when there was
20 testimony at a preliminary hearing or a previous
21 proceeding wherein that person had the opportunity of
22 making objections and what have you.

23 So, where we are, to boil this down, is to
24 those areas to which you spoke earlier wherein you
25 believe that the question is calling for inadmissible
26 evidence, you should do as I suggested when you were at
27 benchside; make that objection and I will rule on it
28 even though it may be made for the first time in this

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1 trial.

2 MR. BLEAKLEY: And I presume that means that if
3 we want to, we can go back and file a motion to strike a
4 portion which has already been read?

5 THE COURT: That's true, you may.

6 MR. BLEAKLEY: Okay. Thank you.

7 THE COURT: And that also would apply as to the
8 previous transcript of a trial that was read; that is,
9 go and make motions to strike.

10 MR. BLEAKLEY: Okay.

11 THE COURT: Okay. Thank you.

12 THE COURT: Fifteen minutes, starting now.

13
14 (A recess was taken in the proceedings.)
15

16 August 28, 2002. Take D FINAL
17

18 (The following proceedings were held
19 in open court within the presence of
20 the jury:)
21

22 THE COURT: The record will reflect the witness
23 is still on the stand and you are still under oath. The
24 jury's in the box, and we may begin the
25 cross-examination.
26

27 MR. BLEAKLEY: Thank you, your Honor.
28 Good afternoon, everyone.

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1 (All respond.)
2

3 * CROSS-EXAMINATION
4

5 BY MR. BLEAKLEY:

6 Q. Good afternoon, Dr. Vandermolen.

7 A. Good afternoon.

8 Q. My name is Peter Bleakley, and I am one of
9 the attorneys for the defendant Philip Morris in this
10 case.

11 We have never met before, have we?

12 A. No.

13 Q. Am I correct that you have never treated

14 or met Mrs. Bullock prior to March of 2001?
15 A. Correct.
16 Q. Or any members of her family?
17 A. Correct.
18 Q. You said on direct examination -- if I
19 don't state it exactly the way you said it, correct
20 me -- but I think what you said is your understanding
21 was that Mrs. Bullock quit smoking for almost or up to a
22 year, something like that?
23 A. Yeah. I said I wasn't certain, but
24 somewhere around a year, thereabouts.
25 Q. Somewhere around a year.
26 In fact, when you first took over
27 Mrs. Bullock's care in March of 2001, you learned that
28 she had not been smoking for three months prior to her

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1 diagnosis with cancer; isn't that right?
2 A. I'd have to look at the record. I don't
3 recall.
4 Q. Okay.
5 A. But if it's in the record, we can read it.
6 MR. BLEAKLEY: I have taken portions of the
7 record out and identified them separately as exhibits,
8 your Honor, if that's all right.
9 THE COURT: Well, if you want to give me a
10 number.
11 MR. BLEAKLEY: I will. I think it will save
12 time, rather than to go looking for things the way we
13 did this morning.
14 THE COURT: Sure. All right. What number?
15 MR. BLEAKLEY: This is what is marked as
16 Exhibit 12278. It's entitled "Second Opinion Medical
17 Oncology Consultation," dated 3-26-2001, and it is
18 signed by Dr. Vandermolen.
19 THE CLERK: I'm sorry? "Second Opinion"?
20 MR. BLEAKLEY: That was the title.
21 THE COURT: "Second Opinion" and then you said
22 something else.
23 MR. BLEAKLEY: "Second Opinion Medical Oncology
24 Consultation."
25 THE COURT: Okay.
26
27 * (Marked for identification Joint
28 Exhibit(s) 12278, document.)

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1
2
3 BY MR. BLEAKLEY:
4 Q. Do you have that document in front of you,
5 Doctor?
6 A. Yes.
7 THE COURT: Is there any objection to it being
8 received in evidence?
9 MR. PIUZE: No.
10 THE COURT: All right. It is received and you
11 may go forward.
12
13 * (Received in evidence Joint
14 Exhibit number 12278, document.)
15
16 BY MR. BLEAKLEY:
17 Q. And this is your notes of your initial
18 consultation with Mrs. Bullock; is that right?

19 A. Correct.
20 Q. And on page 3 of this exhibit, at the top
21 of the page there's a section entitled, "Social
22 History."
23 Do you see that?
24 A. Yes.
25 Q. And there it says, "She is a widow. She
26 has smoked cigarettes, has a 60 pack-year history. She
27 has abstained for the last three months"?
28 A. Yes.

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1 Q. Do you see that?
2 A. Yes.
3 Q. So in March your records show that
4 Mrs. Bullock had not been smoking for three months,
5 which includes at least two months of a period before
6 her diagnosis with cancer; is that right?
7 A. Yes.
8 Q. Okay. And then --
9 A. Sorry. She actually developed cough and
10 and congestion in January of 2001.
11 Q. I understand.
12 A. Well, that cough and congestion was a sign
13 of cancer.
14 Q. But my question was: Before her diagnosis
15 with cancer, she had stopped smoking for at least two
16 months?
17 A. Correct.
18 Q. Exhibit 12282, which is a portion of the
19 medical record relating to Mrs. Bullock, dated
20 3-30-2001, it doesn't have a title on it, but it said
21 "Date of Admission."
22 Do you see that?
23 A. Yes.
24 Q. And on page 2 of that document there is a
25 section, "Social History." It says she has abstained
26 for the past four months, correct?
27 A. Correct.
28 THE COURT: Incidentally, do you want this

2069

1 received in evidence?
2 MR. PIUZE: I was going to offer three of them
3 at the same time, but I will do it as we go along.
4 THE COURT: Any objection?
5 MR. PIUZE: No.
6 THE COURT: Okay. It is received.
7
8 * (Received in evidence Joint
9 Exhibit number 12282, document.)
10
11 THE COURT: The first two are now in.
12 BY MR. BLEAKLEY:
13 Q. And then there is Exhibit 12283, which is
14 a document, again, without a title; but it's, "Date of
15 Admission: 4-14-2001. Reason for admission:
16 Gram-positive bacteremia."
17 And this is a medical record of yours
18 stating, among other things, at page 2 under "Social
19 History," "but has abstained for the past five months,"
20 correct?
21 A. Correct.
22 Q. So at this point in time, while it has
23 been a month-plus since her diagnosis with cancer, she

24 has abstained for five months from smoking, which
25 includes at least two months before her diagnosis with
26 cancer and a couple of months after, right?
27 A. Yeah. On March 6 I say three months, and
28 so early March and mid-April, which is a month and a

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1 half later almost, I say five months. That's correct.

2 Q. Thank you.

3 I would move the admission of 12283 as
4 well.

5 THE COURT: It is received.

6

7 * (Received in evidence Joint
8 Exhibit number 12283, document.)
9

10 BY MR. BLEAKLEY:

11 Q. So your medical records show that she had
12 stopped smoking before she was diagnosed with cancer for
13 at least two months. They show that she had continued
14 to refrain from smoking for another two months; and your
15 testimony is that it is your understanding that she
16 continued to refrain from smoking for almost a year,
17 right?

18 A. I said I wasn't certain; and I think I
19 said around a year, and then I think I said eight, nine
20 months, something like that.

21 Q. I am not trying to pin you down.

22 A. Okay.

23 Q. I am just saying this went on for several
24 months, the fact that she did not smoke?

25 A. My understanding is that she didn't smoke
26 until she developed metastatic disease.

27 Q. Now, when you took over the care of
28 Mrs. Bullock from Dr. Fong, you were provided with

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1 access to the medical records that Dr. Fong had as well,
2 weren't you?

3 A. Not immediately.

4 Q. But you were eventually, weren't you?

5 A. I was given the pertinent records, the
6 records that I required.

7 Q. You were given records from Dr. Fong and
8 Dr. Morrica? Am I pronouncing that correctly, Dr. Bruce
9 Morrica?

10 A. Yeah. Dr. Bruce Morrica was the pulmonary
11 doctor, and I'm not sure that I got his records.

12 Q. But you were provided with Dr. Fong's
13 records, right?

14 A. I spoke to Dr. Fong personally. I spoke
15 to Dr. J. Tassin, who is a radiation therapist who was
16 treating her at the time. I spoke with her primary
17 doctor at the time, Dr. Scott Jenkins.

18 I communicated with all three of those
19 doctors, and I had the hospital record to review at the
20 time that I saw her in March.

21 Q. Including the hospital records for the
22 consultations that Dr. Fong and Dr. Morrica had had with
23 her in February of 2001, right?

24 A. No. That hospital record had Dr. Fong's
25 history and physical exam. The hospital record had
26 results of previous CAT scans and X-rays, and it had
27 results of biopsies that had been done, pathology
28 reports that had been done.

1 Dr. Fong's initial consultation was
2 probably in his office chart, but it was not in the
3 hospital chart.

4 Q. Did you -- did Dr. Fong tell you what his
5 understanding was of Mrs. Bullock's age when she took up
6 smoking?

7 A. No.

8 Q. He didn't tell you that his understanding
9 was she started at the age of 28?

10 A. We didn't talk about her smoking.

11 Q. And you didn't learn either from his
12 records or from talking directly to Dr. Bruce Morrica
13 that he also understood that she had started smoking
14 when she was 28?

15 A. No.

16 Q. When your deposition was taken in this
17 case in December of 2001 -- do you remember that?

18 A. Yes.

19 Q. Your testimony then was -- and it's, I
20 take it, consistent with what you are saying now -- was
21 that your understanding was that at that point in time
22 she was still not smoking?

23 A. I think at that time it was my
24 understanding that she was not smoking, that's correct.

25 Q. Now, you have believed that cigarette
26 smoking causes lung cancer at least since 1977, haven't
27 you?

28 A. Well, I began medical school in 1977. Is

1 that what you are getting at?

2 Q. Yes.

3 A. Yeah. My education in 1977 in medical
4 school was that cigarette smoking causes lung cancer.

5 Q. And you believed it?

6 A. Yes, I did believe it.

7 Q. And you have been telling your patients
8 that they should not smoke since you graduated from
9 medical school in 1980, was it?

10 A. Correct.

11 Q. Right. You have been telling your
12 patients not to smoke and if they smoked to quit smoking
13 since then?

14 A. Correct.

15 Q. And the reason you tell them is because
16 it's dangerous?

17 A. Correct.

18 Q. That it causes serious diseases?

19 A. That's true.

20 Q. That it causes diseases like lung cancer?

21 A. Correct.

22 Q. And chronic obstructive pulmonary
23 disease.

24 A. Right.

25 Q. And you tell them that chronic obstructive
26 pulmonary disease is a very serious disease?

27 A. I'm not a lung specialist, and I don't
28 really comment about lung disease.

1 Q. But you understand that it is a serious
2 disease?

3 A. I understand that chronic obstructive lung
4 disease is a serious disease, yes.

5 Q. It includes emphysema?
6 A. Emphysema, in my mind, in my opinion, is a
7 type of chronic obstructive lung disease.
8 Q. And a very serious one?
9 A. There are different degrees. There are
10 degrees that are serious and there are degrees that are
11 not serious.
12 Q. It can be fatal, can it not?
13 A. It can be fatal.
14 Q. And it's been standard medical practice
15 for physicians like yourself to tell their patients that
16 they should not smoke or to stop their smoking for a
17 long time, hasn't it?
18 A. Yeah. I have been telling patients not to
19 smoke, telling friends not to smoke, telling anybody who
20 will listen not to smoke since I was in medical school.
21 Q. And you know that Mrs. Bullock, the
22 plaintiff in this case, has been suffering from chronic
23 obstructive pulmonary disease for a long time before she
24 was diagnosed with cancer, don't you?
25 A. No. My understanding is she has had
26 chronic bronchitis.
27 Q. You have not learned in the course of your
28 treatment of Mrs. Bullock that she was diagnosed with

2075

1 chronic obstructive pulmonary disease in the 1980s?
2 A. Chronic bronchitis is a type of chronic
3 obstructive pulmonary disease.
4 Q. So you do know that she had chronic
5 obstructive pulmonary disease in the 1980s?
6 A. Yeah. She has chronic bronchitis, but I
7 think you asked me if I knew she had emphysema.
8 Q. No. I asked you if you knew she had
9 chronic obstructive pulmonary disease. What difference
10 does it make what I did ask you.
11 My question now is: You knew that she had
12 chronic obstructive pulmonary disease back in the 1980s,
13 right?
14 A. I knew that she had a history of
15 bronchitis, chronic bronchitis, and that is a type of
16 chronic obstructive pulmonary disease.
17 Q. If you had had a patient back in 1980 with
18 chronic obstructive pulmonary disease, you would have
19 told that patient they better stop smoking, wouldn't
20 you?
21 A. Yes.
22 Q. You would have been especially emphatic
23 with somebody who is already suffering from chronic
24 obstructive pulmonary disease, wouldn't you?
25 A. Yes.
26 Q. You would have told them that if they
27 stopped smoking, they would reduce their risk of getting
28 even more serious diseases, wouldn't you?

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1 A. Certainly.
2 Q. And, in fact, if Mrs. Bullock had stopped
3 smoking back in the 1980s, her risk of contracting lung
4 cancer would have been significantly decreased,
5 wouldn't it?
6 A. Yes.
7 Q. In fact, you even told her she should stop
8 smoking after the recurrence of her cancer, didn't you?
9 A. Yes.

10 Q. Now, I want to ask you a few questions
11 about the testimony you gave here this afternoon about
12 chemo-brain, I think you called it. I realize that
13 wasn't your term, but you said patients sometimes call
14 it chemo-brain, right?
15 A. Yes.
16 Q. You said that people -- I think I quoted
17 you. I wrote down exactly what you said. You said
18 people are not quit as sharp as before chemotherapy; is
19 that right?
20 A. What I meant was patients who are taking
21 chemotherapy, those people.
22 Q. Are not quite as sharp as they were before?
23 A. That's correct.
24 Q. Is that all patients or some patients?
25 A. It's a significant number. Maybe a
26 majority.
27 Q. And you had -- you also said, I think, she
28 has had difficulty with thinking, mentation, right?

2077

1 A. Yes.
2 Q. Now, you know that Mrs. Bullock has given
3 sworn deposition testimony in this case, do you not?
4 A. Yes.
5 Q. You know that her deposition was taken
6 under oath back in October of 2001?
7 A. I don't know when it was.
8 Q. And that she also gave some sworn
9 testimony in this case just this past weekend?
10 A. I am not aware of that.
11 Q. You didn't know -- you haven't read the
12 deposition that she gave in October 2001?
13 A. No, I have not.
14 Q. And you haven't read the testimony that
15 she gave this past weekend?
16 A. No, I have not.
17 Q. So you don't know for a fact that this
18 chemo-brain, assuming that it exists and that it has had
19 an effect, you don't know whether it had any affect on
20 the testimony that Mrs. Bullock gave in October 2001, do
21 you?
22 A. No.
23 Q. And you don't know that the chemo-brain,
24 assuming that it exists and assuming she had it, that it
25 had any impact on the testimony she gave this past
26 weekend?
27 A. No.
28 Q. Now, in August of 2001, you changed the

2078

1 chemotherapy treatments that you were giving, you
2 changed the drugs?
3 A. Correct.
4 Q. I'm probably going to butcher the
5 pronunciation of that, but as I understand it, you
6 changed from Cisplatin --
7 A. Cisplatin.
8 Q. Cisplaatin? I did butcher it.
9 -- to Hycamtin and Taxotere?
10 A. Her initial treatment was Cisplatin and
11 the second drug called Etoposide.
12 Q. Okay.
13 A. And then she was switched to two drugs,
14 Topotecan and Hycamtin.

15 Q. Not Taxotere?
16 A. Topotecan and Hycamtin are the same; and
17 the second drug is Taxotere.
18 Q. Okay. And when her deposition was taken
19 in this case in October 2001, the chemotherapy that she
20 was under was Hycamtin and Taxotere, correct?
21 A. Yeah. I think her treatment was switched
22 sometime later in the fall. So I think that's right.
23 It was Topotecan and Hycamtin at that time or Taxotere
24 and Hycamtin.
25 Q. Now, you said that you don't remember when
26 her deposition was taken in the case, her sworn
27 deposition was taken in the case, but I am going to
28 represent to you that it was taken during the early part

2079

1 of October of 2001. Okay?
2 A. Yes.
3 Q. You were seeing Mrs. Bullock during that
4 period of time, were you not?
5 A. Correct.
6 MR. BLEAKLEY: I have marked for identification
7 as Exhibit 12288, a document entitled, "Orange Coast
8 Oncology Hematology Medical Associates, Inc."
9 THE COURT: Let me make sure that I have the
10 correct number on this.
11 MR. BLEAKLEY: 12288.
12 THE COURT: That's what I have, and tell me
13 again the title.
14 MR. BLEAKLEY: The title is, "Orange Coast
15 Oncology Hematology Medical Associates, Inc." It's a
16 report.
17 THE COURT: And the date?
18 MR. BLEAKLEY: The date is October 3, 2001.
19

20 * (Marked for identification Joint
21 Exhibit(s) 12288, document.)
22

23 BY MR. BLEAKLEY:
24 Q. You know what the Orange Coast Oncology
25 Hematology Medical Associates, Inc. is, don't you?
26 A. Yes.
27 Q. That's your organization?
28 A. Correct.

2080

1 Q. This is a report of a visit with Betty
2 Bullock on that day, right?
3 A. Yes.
4 Q. And the first paragraph reads --
5 THE COURT: Is that received in evidence?
6 MR. BLEAKLEY: I'm sorry. I offer it in
7 evidence.
8 THE COURT: Any objection?
9 MR. PIUZE: No.
10 THE COURT: It may be received.
11

12 * (Received in evidence Joint
13 Exhibit number 12288, document.)
14

15 THE COURT: You may quote.
16 BY MR. BLEAKLEY:
17 Q. The first paragraph reads:
18 "The patient is seen today
19 in followup for small cell lung

20 cancer. She is on day 9 of her
21 third cycle of Taxotere and
22 Hycamtin."
23 No matter how hard I try, I am not going
24 to pronounce it right. (Reading:)
25 "She is doing well and
26 offers no complaints."
27 Do you see that?
28 A. Yes.

2081

1 Q. There were no complaints in this record
2 from Mrs. Bullock on that day that she was having any
3 difficulty with thinking or mentation in this report?
4 A. You are asking me if that's what this
5 says?
6 Q. I'm asking you if that's what it says.
7 A. That is what it says, but I guess I should
8 point out I didn't write this.
9 Q. Now I am going to show you a --
10 A. This was just so the jury, I think, knows,
11 this is written by Jacqueline Grandt, who is my nurse
12 practitioner. So that's what it says, but I can't --
13 Q. That's apparently what she told
14 Ms. Grandt, right?
15 A. Right. But don't ask me what she told
16 Jackie Grandt.
17 Q. Exhibit 12287 is a similar report dated
18 October 4, one day later.

19
20 * (Marked for identification Joint
21 Exhibit number 12287, document.)
22

23 BY MR. BLEAKLEY:

24 Q. Same report, right? She is doing well?
25 A. Yes. October 4, again, a report that
26 was written by Jackie Grandt, nurse practitioner, who
27 works with me.
28 Q. Who reports that Mrs. Bullock is doing

2082

1 well and offers no complaints, correct?
2 A. Correct.
3 THE COURT: Is that now offered?
4 MR. BLEAKLEY: I am going to offer that in
5 evidence, your Honor.
6 THE COURT: Any objection?
7 MR. PIUZE: No.
8 THE COURT: It may be received.
9

10 * (Received in evidence Joint
11 Exhibit number 12287, document.)
12

13 BY MR. BLEAKLEY:

14 Q. Exhibit 12285 is a similar report dated
15 October 8, 2001.
16 A. Yes.
17 MR. BLEAKLEY: I would offer that, 12285.
18 THE COURT: It is received. I take it there is
19 no objection?
20 MR. PIUZE: You take it correctly, your Honor.
21 THE COURT: All right.
22

23 * (Received in evidence Joint
24 Exhibit number 12285, document.)

25

26 BY MR. BLEAKLEY:

27 Q. Once again, Betty Bullock is seen by your
28 nurse. She says, "She offers no complaints and denies

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1 fever, sweats, or bleeding," correct?

2 A. Correct.

3 Q. I am going to represent to you again that
4 this is the period during which Mrs. Bullock's sworn
5 deposition testimony was taken in this case and that she
6 was visiting your office and your nurse, during this
7 period of time, and reported no difficulty in thinking
8 or mentation, at least according to your nurse
9 practitioner.

10 MR. PIUZE: That assumes facts not in evidence.
11 I haven't heard that from these records. I object to
12 that.

13 THE COURT: Your objection is that the records
14 speak for themselves, they are in evidence and whatever
15 they say, they say?

16 MR. PIUZE: No. My objection is that unless
17 Mr. Bleakley has forgotten to read that, the records
18 don't say that.

19 THE COURT: No, no. Maybe I didn't make myself
20 clear. You are objecting to him attempting to quote
21 from a document; and you are saying that the -- it's an
22 improper use of the document, and if he wants to refer
23 to the document, he can either quote it correctly or
24 just refer to the document?

25 MR. PIUZE: I don't think he's attempting to
26 quote from it. I think he's made up words that aren't
27 in there, and that's what I am objecting to.

28 THE COURT: Well --

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1 MR. PIUZE: There is no foundation. It doesn't
2 say that. None of them say that.

3 THE COURT: Wait, Counsel. Objections are not
4 final argument.

5 MR. PIUZE: I'm sorry.

6 THE COURT: Objections have rules and you know
7 them. Now, what is the objection to this, lack of
8 foundation?

9 MR. PIUZE: Yes, sir.

10 THE COURT: All right. May I see the
11 documents?

12 MR. PIUZE: Yes.

13 (A pause in the proceedings.)

14 THE COURT: Each of the documents bears the same
15 sentence that ends the first paragraph, and that
16 sentence is, in each case, quote, "She is doing well and
17 offers no complaints. She denies fevers, sweats, or
18 bleeding."

19 Thank you.

20 BY MR. BLEAKLEY:

21 Q. Dr. Vandermolen, you know what the
22 Physicians' Desk Reference is, don't you?

23 A. Yes.

24 Q. It is a document that identifies
25 prescription drugs, it describes their usages, talks
26 about side effects and adverse effects, correct?

27 A. Yes.

28 Q. Is there anything in the Physicians' Desk

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1 Reference for Taxotere or Hycamtin that says that a loss
2 of cognitive function or inability to think is one of
3 the side effects or adverse effects of those drugs?

4 A. I don't know that it's in the PDR, the
5 Physicians' Desk Reference. It's throughout the
6 oncology literature. There's paper after paper after
7 paper defining the problems that survivors have of
8 cancer, and one of those problems is difficulty with
9 mentation and cognitive function.

10 It's reported throughout the medical
11 literature. Because it's not listed in the PDR doesn't
12 mean it doesn't exist.

13 My wife had chemotherapy for breast cancer
14 two years ago --

15 THE COURT: No, no.

16 THE WITNESS: Sorry.

17 THE COURT: Doctor, this is not an opportunity
18 for personal reminiscences.

19 THE WITNESS: I apologize.

20 THE COURT: Answer the questions that are asked
21 and nothing more; and then at an appropriate time
22 Mr. Piuze, will have an opportunity to take you on
23 redirect.

24 THE WITNESS: I understand. I'm sorry.

25 THE COURT: Go ahead, Counsel.

26 BY MR. BLEAKLEY:

27 Q. Is it your testimony that the medical
28 literature is filled with scientific studies that these

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1 two drugs, Taxotere and Hycamtin, cause a loss of
2 cognitive function in patients?

3 A. I don't know that there's literature that
4 defines these specific drugs. I think it's more that
5 chemotherapy in general causes problems with cognitive
6 function, and the problems that she was having at that
7 time --

8 THE COURT: No, no, no. The question is a
9 specific one, and it's talking about medical literature
10 and you have answered that.

11 Move on.

12 BY MR. BLEAKLEY:

13 Q. The chemotherapy drug that Mrs. Bullock is
14 using now is a different one, as I understand it; is
15 that right?

16 A. Yes.

17 Q. It's called Gemzar.

18 A. Gemzar.

19 Q. Gemzar. I mispronounced it again.

20 That's the one that she is taking now?

21 A. Correct.

22 Q. And last weekend, that's the chemotherapy
23 drug that she would have been using?

24 A. Right.

25 Q. Is there anything in the medical
26 literature for Gemzar that concludes on the basis of
27 scientific research or studies that Gemzar causes a loss
28 of cognitive function in patients who use it?

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1 A. I would answer that no, to my knowledge
2 there is no specific data on Gemzar.

3 Q. Is there anything in the Physicians' Desk
4 Reference, the PDR, for Gemzar that identifies loss of
5 cognitive function or inability to think as one of the

6 side effects or adverse effects of Gemzar?
7 A. I'm not aware that there is.
8 Q. Now, this loss of -- difficulty thinking,
9 I'm not sure I know what you mean by this, so let's
10 explore this for a second.
11 Do you mean that, in your opinion, people
12 who take chemotherapy forget things that happened a long
13 time ago?
14 A. It's variable. It can be forgetfulness
15 for recent events. It could be forgetfulness for events
16 from a long time ago. Most of the time it's described
17 as just a sense of not being as sharp, not being as
18 clearheaded as -- not having the mental acuity, the
19 mental power, so to speak.
20 Just a dulling of one's ability to think,
21 to comprehend, to remember. Patients complain of
22 forgetfulness, having to write things down.
23 Q. Does it mean that people who are having
24 this effect remember things incorrectly?
25 A. I have had patients remember things
26 incorrectly.
27 Q. As the result of taking chemotherapy?
28 A. I'm not sure that it's directly a

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1 consequence of the chemotherapy.
2 Q. You have answered the question. You have
3 answered the question.
4 Let me ask you this: Does this
5 chemotherapy or chemo-brain cause someone, to give an
6 example, to say, "When I was young, my dad had a
7 Cadillac" when, in fact, what he had was a Jeep?
8 A. I don't know. I have never encountered
9 that.
10 Q. Does it mean that you simply can't rely on
11 what people tell you as being what happened or what
12 didn't happen?
13 A. It's more subtle. There may be some
14 inaccuracies. They may not remember events as they
15 actually occurred, but it's subtle. It's not a Cadillac
16 or a Jeep. It's not that obvious often. It's, as I
17 say, just a lack of getting things right, getting things
18 straight, having things in order.
19 Q. Let me get very specific.
20 Mrs. Bullock's sworn deposition was taken
21 in this case. She was asked questions by counsel for
22 Philip Morris. Her sworn testimony was taken last
23 weekend by her counsel. She was asked questions. A lot
24 of them dealt with the past and things that happened in
25 the past.
26 Are you telling us that we can't rely on
27 what she said?
28 A. Can't rely on what she said at what time?

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1 Q. What she said about things and events that
2 occurred many years ago?
3 A. What she said last week?
4 Q. What she said in October 2001 and what she
5 said last week. Let's take them separately.
6 Does that mean that we cannot rely on what
7 Mrs. Bullock said in a sworn deposition in October 2001
8 about events that occurred a long time ago?
9 MR. PIUZE: Your Honor, that -- excuse me --
10 that question is extremely overbroad.

11 THE COURT: Sustained.
12 BY MR. BLEAKLEY:
13 Q. Does it mean that this jury cannot rely
14 on statements that Mrs. Bullock made under oath in her
15 deposition as being factual?
16 MR. PIUZE: It's still overbroad. I object.
17 THE COURT: Sustained.
18 THE WITNESS: We didn't --
19 THE COURT: Excuse me, Doctor, there is no
20 question right now. When I say "sustained," then you
21 are off the hook.
22 THE WITNESS: Thank you.
23 THE COURT: Are you asking him -- just so I
24 understand the question -- that the jury would not be
25 able to rely on anything that she said? Is that the
26 essence of the question?
27 MR. BLEAKLEY: I was, and your Honor sustained
28 an objection; too broad.

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1 THE COURT: Yes, it sure is.
2 MR. BLEAKLEY: So I am going to get specific.
3 THE COURT: Okay.
4 MR. BLEAKLEY: That's fair. It is too broad.
5 Q. Let's take, as an example, if Mrs. Bullock
6 testified in her deposition in October 2001 that she
7 tried to quit smoking in the 1970s. Is your testimony
8 that chemo-brain means that we can't accept that as
9 being factual because she might have it wrong as a
10 result of taking chemotherapy?
11 A. We did an MRI scan of her brain in August
12 of 2001; and the reason we did that MRI scan is because
13 she was having difficulty with mentation, with cognitive
14 function.
15 Q. And you found nothing in the MRI?
16 A. I was concerned that she could have cancer
17 in the brain. Small cell lung cancer frequently
18 metastasizes to the brain; very, very common, the
19 overwhelming majority of cases.
20 We didn't find cancer in the brain, but
21 the reason for doing the scan was difficulty with
22 cognitive function.
23 Q. But you didn't find anything in that MRI
24 scan that either affirmed or disproved that she was
25 suffering from lack of cognitive function, did you?
26 A. No, that's not true. The MRI scan was
27 abnormal. It's August 11, 2001, if I can read --
28 Q. You can read that portion which relates to

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1 the issue of whether or not the MRI reveals anything
2 about a loss of cognitive function.
3 A. There's no --
4 Q. First answer the question. Does it or
5 does it not?
6 A. Yes.
7 Q. Read it. Please read it for us.
8 A. The absence of an abnormality often makes
9 a diagnosis.
10 Q. Would you answer the question I asked you
11 now, which is to read from the MRI scan results that
12 which pertains to the issue of a loss of cognitive
13 function, if there is any such thing in there.
14 A. No, there is nothing that says there is a
15 loss of cognitive function. That wouldn't be seen on

16 an -- that wouldn't be -- that's not something that's --
17 you're asking for something that would never be there.

18 Q. Now let's go back to the question that I
19 asked you, which I don't believe you answered, which is:
20 Does the fact that Mrs. Bullock may have been suffering
21 from some sort of loss of cognitive function as a result
22 of chemotherapy mean that we cannot rely on her
23 testimony that she tried to quit smoking in the 1970s?
24 And if the answer is "I don't know," the answer is "I
25 don't know."

26 A. And I think that's that I don't know what
27 you could rely on.

28 Q. And if she testified during her testimony

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1 this past weekend -- I'm sorry -- if she testified in
2 October of 2001, "he" -- referring to her first
3 husband, Phillip Wulff -- "He did not know I was
4 smoking, he -- I was back in South Dakota. I was
5 married to him three years; and his mother smoked and
6 father was dying of a malignant brain tumor; and we
7 lived at their motel/mobile home park. So when I would
8 help my mother-in-law at the motel, if she was doing any
9 of the housework, she would sit down and have a
10 cigarette; so we kept it our secret because her son did
11 not like smoking," can we rely on that or not?

12 A. I don't know.

13 MR. BLEAKLEY: I have nothing further. Thank
14 you.

15 THE COURT: Redirect.

16 MR. PIUZE: A little.

17

18 * REDIRECT EXAMINATION

19

20 BY MR. PIUZE:

21 Q. When you told the jury that Betty Bullock
22 had mentation problems or cognitive problems, I guess we
23 should be clear.

24 Did she come in to you and say, "I am
25 reporting mentation problems"? Or is that something you
26 picked up from looking at her, talking to her, and being
27 with her?

28 (A pause in the proceedings.)

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1 A. Okay. There's a note here on the chart of
2 August 8, 2001. "She is relatively asymptomatic;
3 however, she has had increasing difficulty with
4 decreased cognitive function."

5 Q. Did you think that decreased cognitive
6 function might be a symptom of a brain tumor having
7 metastasized from the lung?

8 A. Yes.

9 Q. Is that why the MRI was done?

10 A. Yes.

11 Q. Did the MRI show no brain tumor?

12 A. It showed no brain tumors, correct.

13 Q. Taking away the brain tumor as a cause for
14 decreased mentation or impaired mentation, what did that
15 leave, in your opinion?

16 A. That the cause of her decreased mental
17 function was not from tumor on the brain but from
18 another cause.

19 Q. That cause, in your opinion, was what?

20 A. Related to her treatment, related to her

21 cancer.
22 Q. When you say -- and I think you did -- it
23 is unknown if the mentation problems were caused -- and
24 you either said only by the chemo or solely by the
25 chemo, I don't know which, but it was one of those
26 terms -- what did you mean by that?
27 A. That it's not -- that this problem with
28 decreased mental function in patients who are treated

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1 with chemotherapy for cancer is well-defined; but
2 whether or not it's cause and effect due to the drugs
3 directly causing the problem or it's an altered immune
4 system that causes the problem.
5 There are other things that happen with
6 cancer that are called paraneoplastic syndromes, where
7 the cancer cells produce substances, hormones, that can
8 affect other parts of the body. It can affect the
9 brain. It can affect the liver. It can affect kidney.
10 It can affect metabolism. It can cause calcium levels
11 to go up. It can cause other electrolyte abnormalities.
12 It's a para, meaning next to; neoplastic
13 meaning next to the cancer. So it's a problem
14 associated with the cancer itself.

15 There's problems like Alzheimers,
16 dementias that are associated with the cancer. It is
17 not cause and effect. The drug hasn't been proven, but
18 it's the global problem. It's the chemotherapy. It's
19 the cancer. It occurs, well-documented, in patients who
20 are undergoing treatment for cancer; but I can't say
21 that drug X results in this mental problem directly.

22 Q. I didn't ask you to say that, but what I
23 will ask you to say is this: You have taken care of
24 5,000 cancer patients. Is this type of problem
25 secondary to the cancer combined with the treatment
26 common?

27 A. Yes.

28 MR. PIUZE: I won't ask you to say anything

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1 else. I'm done. Thank you.
2 THE COURT: Recross.

3
4 * RECCROSS-EXAMINATION

5
6 BY MR. BLEAKLEY:

7 Q. In August of 2001, when Mrs. Bullock
8 complained about a loss of cognitive function, or
9 however she put it, and you thought there was something,
10 you changed the chemotherapy that she used after that,
11 didn't you?

12 A. It was shortly after that, correct.

13 Q. And there is, in fact, nothing in your
14 records of any kind from then until the following
15 February 2001 in which there is any reference of any
16 kind to a loss of cognitive function, a difficulty
17 thinking, lack of mentation, however you put it, there
18 is not a single reference in any of the medical records
19 to any such problem in September, October when her
20 deposition was being taken, November, December or
21 January of 2002; isn't that right?

22 A. That could be true.

23 MR. BLEAKLEY: I have nothing further.

24 THE COURT: All right. Doctor, we thank you
25 very much for being here. I ask you to turn off the

26 microphone and unhook it. We would be grateful.
27 MR. PIUZE: Your Honor, may this witness be
28 excused?

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1 THE COURT: Surely.
2 Tomorrow we will operate for a half a day,
3 and we will have, we believe, a live witness.
4 MR. PIUZE: Dr. Farone.
5 THE COURT: And then we will be off tomorrow
6 afternoon. I have previously indicated to you that on
7 Friday this case will be in recess and I will be working
8 on an unrelated case.

9 However, on the day we return, Tuesday the
10 3rd of September, all counsel in this case are going to
11 be meeting with another judge in another courtroom on
12 another matter, and that was originally scheduled for
13 9:00 o'clock, which would move our starting time down
14 the road considerably.

15 But that judge has graciously agreed, as
16 have counsel, to meet with them at 8:30 on the 3rd. So
17 we will begin here at 9:30 on Tuesday the 3rd of
18 September. You are obviously welcome to come earlier if
19 you want to, but the chances are that we won't be
20 starting before 9:30.

21 Again, thank you very much. You are
22 excused for the evening. We will see you tomorrow
23 morning at 9:00.

24 Again, the admonition. Don't discuss this
25 case amongst yourselves or with anyone else, and do not
26 form or express any opinion on the matter until it's
27 finally submitted to you. Thank you.
28

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1 (The following proceedings were held
2 in open court outside the presence
3 of the jury:)

4
5 THE COURT: Anything you folks want on the
6 record?

7 MR. PIUZE: Not from my side.

8 MR. BLEAKLEY: No, your Honor.

9 THE COURT: We are off the record.
10

11 (The matter was continued to Thursday,
12 August 29, 2002 at 9:00 a.m. for further
13 proceedings.)
14

* * *